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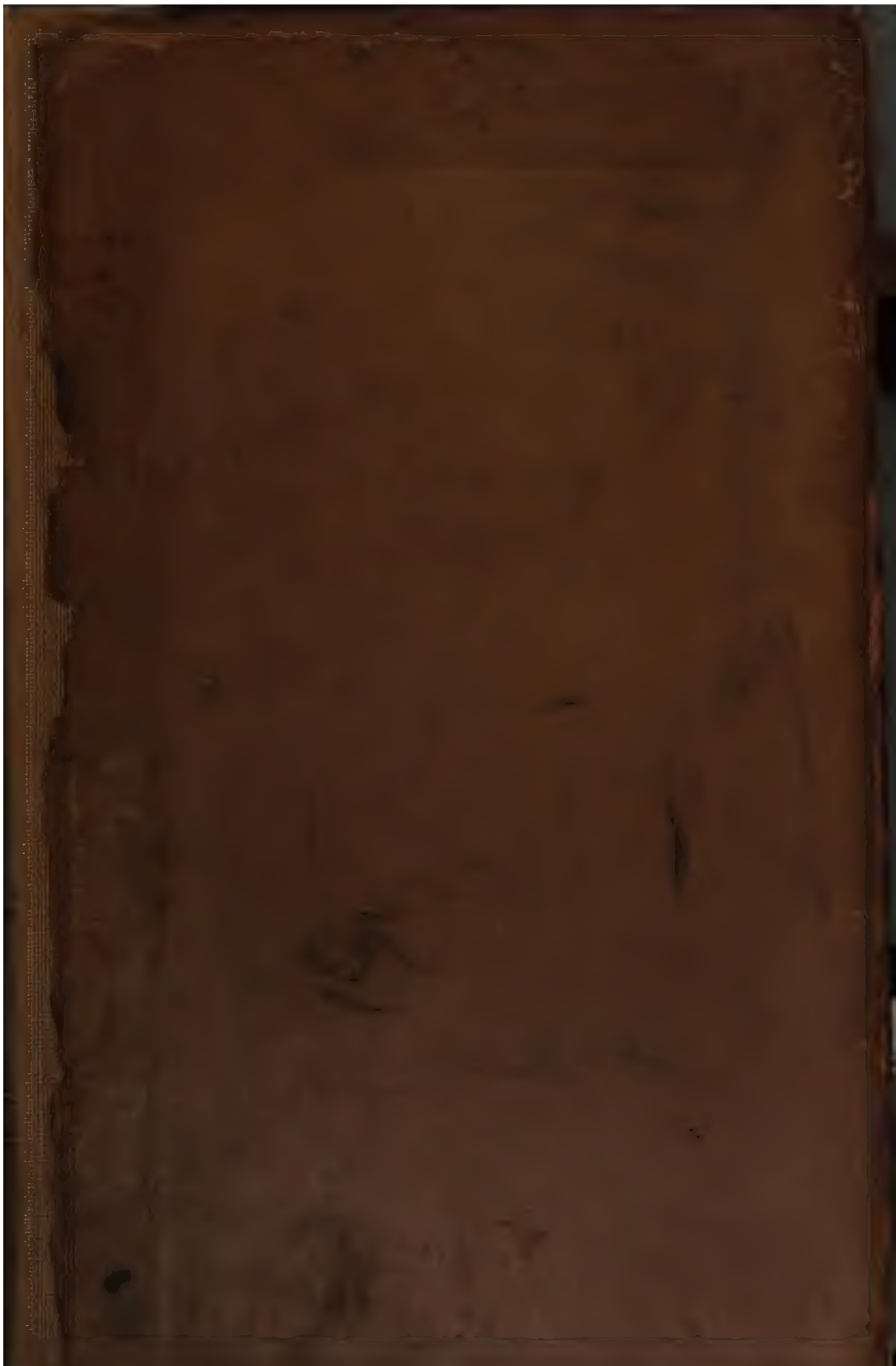
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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY

DURING THE TIMES OF
Lord Chancellor Eldon
AND
Lord Chancellor Lyndhurst.

By JAMES RUSSELL, Esq.
BARRISTER AT LAW.

VOL. III.
1826, 1827. — 7 & 8 GEO. IV.

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1830.



Earl of ELDON,
Lord LYNDHURST, } *Lords High Chancellors.*

Sir JOHN S. COPLEY,
Sir JOHN LEACH, } *Masters of the Rolls.*

Sir JOHN LEACH,
Sir ANTHONY HART, } *Vice-Chancellors of*
Sir LANCELOT SHADWELL, }

Sir CHARLES WETHERELL,
Sir JAMES SCARLETT, } *Attorneys-General.*

Sir N. C. TINDAL, *Solicitor-General.*

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REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY.

DEARLE v. HALL.

LOVERIDGE v. COOPER.

1825.
June. July.
December.

1827.
May 8.
November 8, 9.

1828.
December 24.

THE cases of *Dearle v. Hall* and *Loveridge v. Cooper* involved the same principle; and the decision in the latter, both on the original hearing and on appeal, was pronounced immediately after judgment had been given in the former, and with reference to the reasons and authorities on which that judgment proceeded. These circumstances render it convenient to combine, to some extent, the report of the one case with that of the other.

A person having a beneficial interest in a sum of money, invested in the names of trustees, assigns it for valuable consideration to *A.*, but no notice of the assignment is given to the trustees; afterwards, the same person

proposes to sell his interest to *B.*, and *B.*, having made inquiry of the trustees as to the nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase, and gives the trustees notice: *B.* has a better equity than *A.* to the possession of the fund, and the assignment to *B.*, though posterior in date, is to be preferred to the assignment to *A.*

It is of no importance in the question as to the priority of title acquired under the assignments; whether the interest of the vendor be vested or contingent, present or reversionary.

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The case of DEARLE v. HALL arose out of the following transactions: —

Peter Brown, by his will, dated the 11th of *September* 1794, after bequeathing some legacies, and giving an annuity of 40*l.* to a granddaughter, made the following disposition of a part of the residue of his personal estate and of the money to arise by the sale of his real estates: — “ I do hereby direct my said executrix and executors, and the survivors and survivor of them, and the executors and administrators of such survivor, to place one moiety of the said residue of my personal estate, and of the money to arise from the sale of my real estates, out at interest upon government or real security, during the life of my son *Zachariah Brown*, and to pay the interest and produce thereof unto him my said son *Zachariah Brown* during his life.”

Ann Bircham, *William Foster* the elder, *William Foster* the younger, and *William Unthank*, the executrix and executors of *Peter Brown*, had invested the clear residue of the testator's estate, amounting to 4600*l.*, on real securities: and the share of the interest yielded by these securities, which was payable to *Zachariah Brown*, came to about 93*l.* a year. Mr. *Unthank* was a solicitor, and took the principal share in the management of the testator's estate.

By an indenture, bearing date on the 19th of *December* 1806, and made and executed by and between *Zachariah Brown* of the first part, *Charles Martin Demages* of the second part, *William Bircham* of the third part, and *William Dearle* of the fourth part, — (reciting, that *Zachariah Brown* was, under the last will of his father *Peter Brown*, entitled for life to the yearly annuity of 93*l.*, issuing out of a moiety of *Peter Brown*'s residuary estate, and which was then paid to him by

Ann

*Ann Bircham, William Foster the elder, William Foster the younger, and William Unthank, the executors and executrix of Peter Brown; that Zachariah Brown had agreed, in consideration of the sum of 204*l.*, to sell to Dearle an annuity of 37*l.* a year during the natural life of him Zachariah Brown, the payment of which was to be secured by the covenant and warrant of attorney of Zachariah Brown, and also of Charles Martin Demages, and William Bircham, who had agreed to become jointly and severally sureties for him),—it was witnessed, that, in pursuance of the said agreement, and of the sum of 204*l.* paid to Zachariah Brown, they, Zachariah Brown, and Charles Martin Demages, and William Bircham, did, for themselves, their executors and administrators, jointly and severally covenant with William Dearle, his executors, administrators, and assigns, that they, their heirs, executors, or administrators, or some or one of them, should pay or cause to be paid unto William Dearle, his executors, administrators, and assigns, during the natural life of Zachariah Brown, one annuity of 37*l.*, free of and clear from all taxes, charges, and deductions, by equal quarterly payments, on the 19th of *March*, the 19th of *June*, the 19th of *September*, and the 19th of *December*, in every year.*

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The indenture further witnessed, that, “for the better and more effectually securing the payment of the aforesaid annuity, he, Zachariah Brown, granted, bargained, sold, and assigned unto William Dearle, his executors, administrators, and assigns, all and singular the yearly sum or annuity of 93*l.*, and all arrears thereof, yearly arising or growing, and to which he, Zachariah Brown, was entitled for life, under the will of Peter Brown, and all the estate, right, title, interest, trust, property, benefit, claim, and demand of him Zachariah Brown in, to, or out of the same,” to have and take all the interest, dividends, and proceeds of the aforesaid stocks.

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or sums, and all other the premises thereby assigned, in as ample and beneficial a manner as he, *Zachariah Brown*, was then entitled to the same; but, nevertheless, upon trust to permit and suffer *Zachariah Brown* and his assigns to receive and take the same, until default should be made for the space of twenty-one days in payment of some quarterly instalment of the annuity, or some part thereof; and upon further trust, in case any quarterly instalment of the annuity, or any part thereof, should happen to be in arrear or unpaid for the space of twenty-one days next after any of the days or times aforesaid, then that *William Dearle*, his executors, administrators, or assigns, should receive and take the thereby assigned interest, dividends, and proceeds, and should thereout, in the first place, retain and satisfy to himself and themselves the costs of receiving the same, or otherwise attending the performance of the trusts thereby declared; and, in the next place, should thereout retain, reimburse, and satisfy to himself or themselves the said annuity, or so much thereof as should be then in arrear, and should pay, or otherwise permit and suffer him *Zachariah Brown*, or his assigns, to receive and take the residue or surplus thereof, if any, to and for his and their own use and benefit. This declaration of trust was followed by a proviso making the annuity redeemable. A memorial of this indenture, and of the warrant of attorney mentioned in it, was enrolled.

By another indenture, bearing date on the 26th of *September* 1809, and made and executed by and between *Zachariah Brown* of the first part, *William Bircham* of the second part, and *Caleb Sherring* of the third part,—(reciting *Zachariah Brown*'s title under his father's will; that he had contracted to sell an annuity of £7*l.* for his own natural life to *Caleb Sherring*, which, it had been agreed, should be secured by the covenant and warrant
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of attorney of *Zachariah Brown* and *William Bircham* as his surety; and that *Zachariah Brown* and *William Bircham* had, for that purpose, jointly and severally executed a warrant of attorney to confess judgment in the sum of 300*l.*;) — it was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of 150*l.*, they, *Zachariah Brown* and *William Bircham*, did for themselves, their heirs, executors, and administrators, jointly and severally covenant to pay or cause to be paid to *Caleb Sherring*, his executors, administrators, and assigns, from thenceforth during the natural life of *Zachariah Brown*, one annuity of 27*l.*, free and clear of and from all taxes, charges, and deductions, by equal quarterly payments, on the 26th of *December*, the 26th of *March*, the 26th of *June*, and the 26th of *September*: and it was thereby further witnessed, that, for the “better and more effectually securing the payment of the aforesaid annuity,” *Zachariah Brown* granted, bargained, sold, and assigned unto *Caleb Sherring*, his executors, administrators, and assigns, the above-mentioned yearly sum or annuity of 93*l.*, and all arrears thereof. This assignment took no notice of the indenture of the 19th of *December* 1808, but was expressed in similar language, and was upon similar trusts. A memorial of this second indenture, and of the warrant of attorney mentioned in it, was enrolled.

The annuity of 37*l.* was paid up to the 19th of *June* 1811, and that of 27*l.*, up to the 26th of *June* 1811. From those dates both annuities had been unpaid; save only that, in *May* 1813, *Dearle*, having arrested the surety, *Demages*, in an action upon the covenant, compelled him to pay the arrears of his annuity for one year and three quarters, up to the 19th of *March* 1813.

Notwithstanding these assignments, *Brown*, early in 1812, advertised his life-interest in the 93*l.* for sale as

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an unincumbered fund; and this advertisement led to a negotiation with *Joseph Hall*, who proposed to become the purchaser. *Hall's* solicitor, *Mr. Patten*, used all due diligence in scrutinising *Brown's* title; and, in a correspondence which took place between him and *Mr. Unthank*, the acting executor, he inquired of *Mr. Unthank* the exact amount payable to *Brown*, and called for every information respecting the fund and the title.

No notice of the assignments to *Dearle* and *Sherring* had been given to the executors; and as *Mr. Unthank* was in complete ignorance of the existence of such instruments, none of his letters made any mention of or allusion to any incumbrance as affecting the property. Under these circumstances, the contract between *Brown* and *Hall* was carried into effect, by an indenture dated the 20th of *March* 1812, made between *Joseph Hall* of the one part, and *Zachariah Brown* of the other part; which, after reciting *Brown's* title and contract with *Hall*, witnessed, that, for the sum of 711*l.* 3*s.* 6*d.*, *Zachariah Brown* thereby assigned unto *Joseph Hall*, his executors, administrators, and assigns, all the annual income, interest, and dividends of the moiety of the residuary estate of *Peter Brown*, consisting (among other things) of the several sums of money due upon certain mortgages and securities specified in an annexed schedule, to receive and take the interest and dividends from the 25th of *December* then last past, during *Zachariah Brown's* life. *Brown* also covenanted for quiet enjoyment, and that he had done no act to encumber the fund; and he constituted *Hall*, his executors, administrators, and assigns, the attorney and attornies of him, *Brown*, for the purpose of receiving the dividends. The executors of *Peter Brown* had been requested to become parties to the deed, but had refused.

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On the 25th of *April*, *Hall* served a written notice on the executors, requiring them to pay to him, as assignee of *Zachariah Brown*, the moiety of the dividends of the residuary fund during *Brown's* life; and, in *July* 1812, *Unthank* remitted to *Hall* 31l. 12s. 10d. on account of the yearly dividends so assigned. On the 17th of *October* following, the executors, for the first time, received notice of the assignments to *Dearle* and *Sherring*; and they thenceforward declined to pay the interest to any of the claimants, until their rights should be ascertained.

The material parts of the correspondence between *Hall's* solicitor and the executors are stated by the Master of the Rolls in his judgment.

On the 17th of *June* 1819, *Dearle* and *Sherring* filed their bill against *Hall*, *Zachariah Brown*, the sureties for the payment of their respective annuities, and the personal representatives of *Peter Brown*. The bill charged, that, even if *Hall* had given the executor notice of his assignment before *Dearle* and *Sherring* gave notice of their incumbrances, the preferable title, which they acquired by reason of the prior date and execution of the instruments under which they claimed, could not be prejudiced by that circumstance; that *Hall* did not, before he completed his purchase, make or cause to be made any inquiries of the executors of *Peter Brown*, for the purpose of ascertaining whether they had received notice of any incumbrances affecting the funds out of which the annuity was to be paid; that it was incumbent on *Hall* and his agents, before the completion of his purchase, to have searched, or caused search to be made, at the proper offices, for the purpose of ascertaining whether there were any prior incumbrances affecting the funds; that he and they were

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guilty of laches in omitting to make such search; and that, if such search had been made, *Hall* would have ascertained that the Plaintiffs were entitled respectively to their annuities of 37*l.* and 27*l.* The prayer in substance was, that the arrears and growing payments of the annuity of 93*l.* a year might be applied in satisfying to the Plaintiffs, according to their priorities, what should be found due to them on their several annuities, and their costs in recovering the same; and that the executors of the testator might be restrained from paying any part of the arrears or growing payments of the 93*l.* a year to *Hall*, or to any other person than the Plaintiffs, until all the arrears due to them in respect of their annuities should have been satisfied.

Hall, by his answer, relied on the indenture of the 20th of *March* 1812, and the priority of his notice; submitting to the judgment of the Court, whether the Plaintiffs were not bound to have given to the executors of *Peter Brown*, within a reasonable time, and before *March* 1812, notice of the assignments made to them respectively — whether, by having omitted to give such notice, till after the execution of the Defendant's indenture of assignment, they were not precluded in a court of equity from having any benefit of their assignments as against him — and whether they ought not to resort, for the payment of their annuities, to their personal remedies against *Zachariah Brown* and his sureties?

Hall further stated, that, before the execution of the assignment to him, and the completion of his purchase, he, by his solicitors, made inquiries of the executors respecting the title of *Zachariah Brown* to the dividends in question, and respecting the securities on which the fund was invested; and that, though a correspondence

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on the subject took place between his solicitor and *Unthank*, the acting executor, no notice or intimation of the existence of any incumbrance on *Brown's* life interest was given to him, *Hall*, or to any person on his behalf, either by the executors or by any other individual. But he admitted, that he did not, before he completed his purchase, make, or cause to be made, any inquiries of the executors of *Peter Brown* expressly for the purpose of ascertaining, whether they had received notice of any incumbrance or incumbrances affecting *Zachariah Brown's* life-interest in the moiety of the dividends of the residuary estate; and that he did not make, or cause to be made, any search at any of the offices, in order to ascertain whether any such incumbrances existed. He insisted, also, on some alleged defects in the memorials of the annuities granted to the Plaintiffs.

Zachariah Brown stated by his answer, that, at the date of the assignment to *Hall*, he believed the former annuities to have been redeemed.

A former bill, filed for the same purpose as the present, had been suffered to be dismissed for want of prosecution.

The executors had paid into court the arrears of the dividends of *Zachariah Brown's* moiety of the residuary fund.

Mr. *Sugden* and Mr. *Phillimore*, for the Plaintiffs.

Mr. *Horne* and Mr. *Barber*, for *Hall*.

Mr. *Roupell*, for the trustees.

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The point contended for by the Plaintiffs was, that, *primâ facie*, the priority of their assignments gave them a preferable title to the possession of the fund, and that nothing had been done which afforded a sufficient reason for postponing them.

The Defendant, *Hall*, on the other hand, argued, that, by giving the first notice to the trustees, he had first done all that could be done to make the title to an equitable interest in a personal chattel complete; that the Plaintiffs, on the other hand, by omitting to give notice of their incumbrances, had chosen to remain satisfied with an imperfect title, and had enabled *Brown* to commit a fraud; and that, under such circumstances, the equity of him, *Hall*, though arising under an instrument of later date, was a better equity than theirs.

It was admitted in the argument, that there was no direct authority upon the point; but a case of *Wright v. Lord Dorchester* (a) was referred to, in which it appeared from an interlocutory order made by Lord *Eldon*, that the inclination of his opinion was in favour of the purchaser who gave the first notice, as against a prior purchaser who gave no notice.

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The MASTER of the ROLLS, Sir Thomas Plumer,

Went through the facts of the case, and stated his opinion, that *Hall's* claim was to be preferred to that of the Plaintiffs. The principle, on which he chiefly relied, was, that the Plaintiffs had been negligent; and, in consequence of their negligence, third parties had been involved in transactions which could not have taken place, if the first purchasers, by omitting to communicate their claims to the legal holders of the fund, had not put it out of the power of those legal holders, though acting with

(a) See *infra*, p. 49.

perfect fairness and honesty, to represent to the subsequent purchaser the true state of circumstances; that, where a first purchaser, by his negligence, placed a subsequent purchaser, who had acted with all due caution, in such a situation, that loss must fall either upon the one or the other, he, who had been in default, and had caused the mischief, ought not to be saved harmless at the expence of an innocent party; that, under such circumstances, the general rule of priority ought to be qualified, and that he, who stood first in point of time, ought to be postponed to a competitor claiming under an instrument of later date, who had been informed by the legal holder of the fund, that there were no incumbrances affecting it, and who gave that legal holder notice of his purchase, before notice had been given of any other incumbrance.

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But as the point did not appear to have been expressly determined in any preceding case, and was of great importance, his Honour declined coming to any final judgment in the cause, till the question was again argued.

The case was again argued, by Mr. *Sugden* for the Plaintiffs, and by Mr. *Barber* for the Defendant *Hall*.

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It is observable, in the first place, that the right, which *Zachariah Brown* had under the will of his father, was simply a right to a chose in action. The legal interest in the residue was vested in the executrix and executors; and they were to hold this moiety of the residue so long as *Zachariah Brown* lived. They were to pay him the dividends during his life; but it is clear, from the terms of the will, that they were not to part with the legal interest.

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Dearle, when he entered into this contract, seems to have been anxious to secure the payment of the annuity in many different modes. He took the precaution to have, not only *Brown's* covenant, but the joint and several security of *Demages* and *Wm. Bircham*: he took also a warrant of attorney to confess judgment. In fact, the fund in question was the last security resorted to, and is specified as a further and collateral security.

One of the terms of the contract was, that *Brown* and his assigns were to be permitted to receive the 99*l.* a year, until default should be made for the space of twenty-one days in payment of the annuity. Not only, therefore, was the contract not followed by possession of the fund, but there was an express stipulation to the contrary: so that the transaction with *Dearle*, at the time when it happened, was nothing more than an equitable contract for a collateral security, to be issuing out of a chose in action, not followed by equitable possession, nor by any thing tantamount thereto. It was not possible for *Brown* to transfer the legal interest: that could not but remain with the executors; but wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession, namely, notice given to the legal depositary of the fund. Where a contract, respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of — that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him;

him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect; and it is fit that it should be understood, that the solicitor, who conducts the business for the party advancing the money, is responsible for that neglect. [The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his *cestui que trust*. The original *cestui que trust*, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those, who may chance to deal with him, protect themselves from his fraud? Whatever diligence may be used by a *puisne* incumbrancer or purchaser — whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right, — the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by those

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those who, in transactions of that kind, omit to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty: and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence.

It was as easy for *Dearle*, or his solicitor, to have given notice in 1808 of the equitable contract with *Brown*, as in 1812. In not doing so, he was guilty of negligence, — of gross negligence, which exposed the property to all that has since happened; — which enabled *Brown* to practise on another innocent individual so as to induce him to lend his money, without any suspicion of the existence of a preceding conveyance; — which, leaving the trustees in ignorance of the fact, led them into the erroneous belief, that *Brown* was the owner of the whole equitable right, and induced them to represent him as the owner to the individual who, at a period long subsequent, became the purchaser of the fund. In *June* 1811, *Dearle's* annuity fell into arrear, and, from that time, was in arrear for much more than twenty-one days. *Dearle* had then a right to take immediate possession of the fund; yet he allowed *Brown* to continue in undisturbed enjoyment of it, and, for more than a year afterwards, he took no step towards obtaining possession of the 93*l.* a year, which was a collateral security for the payment of what was due to him. Not even then did he give notice of the existence of his incumbrance to the executors; and they continued to hand over the income to *Brown*, as the only person having any claim to it.

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The deed, under which the other Plaintiff, *Caleb Sherring*, claims, is, with little variation, similar to the deed to *Dearle*, and was probably drawn by the same professional gentleman; yet no notice is taken in it of the prior conveyance to *Dearle*, nor is any thing done by *Sherring* to obtain immediate possession of the fund. On the contrary, in this as in the other indenture, it is expressly stipulated, that *Brown* and his assigns should be permitted to receive the 93*l.* a year, till default was made for twenty-one days in the payment of the annuity. *Sherring's* annuity of 27*l.* was paid up to *June* 1811, and then fell into arrear, but no step was taken to reach the fund. It was not till the 17th of *October* 1812, that notice of these two annuities was, for the first time, given to the executors. The act of then giving notice shews, that the annuitants were aware that notice was necessary, in order to complete their security; but their tardiness in giving notice constitutes the negligence which has produced all the mischief. For *Brown*, having, by the conduct of *Dearle* and *Sherring*, been thus left at liberty to deal with the property as he pleased, availed himself of this power, and was even so confident as to advertise his life-interest for sale, publicly inviting purchasers to treat with him as for an unincumbered fund. In *March* 1812, more than half a year before *Dearle* and *Sherring* gave the executors notice of their annuities, the contract was made between *Brown* and the Defendant *Hall*; and, in the same month, an indenture of assignment was executed, reciting *Brown's* right under his father's will to the 93*l.* a year, by which, in consideration of 700*l.* and upwards, *Brown* transferred that 93*l.* a year to *Hall*.

In concluding this contract, *Hall* conducted himself in a way very different from that in which the Plaintiffs had acted; for, before he paid his money, he took the pre-

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precaution of making, by his solicitor, all due inquiries of the trustees and executors; not trusting to his personal contract with *Brown*, but going immediately to the legal holders of the fund, strictly investigating the title, and employing a very exact and scrutinising industry to ascertain whether the fund was as represented by *Brown*, and whether *Brown* could completely transfer the interest which he stated himself to have.

The correspondence between Mr. *Patten*, the solicitor of *Hall*, and Mr. *William Unthank*, the acting executor, commenced early in *February* 1812. On the 4th of that month, Mr. *Patten* wrote to Mr. *Unthank*, stating that he had drawn a contract between *Brown* and *Hall*, for the purchase of *Brown's* life-interest under his father's will, and requesting to be furnished with an abstract of *Brown's* title, and of the titles on which the money was invested, as well as with any other information on the subject, "and with the exact clear amount you pay to *Brown* annually." Mr. *Unthank*, in his answer, dated the 6th of *February*, sent an extract of the will of *Peter Brown*, and stated, that *Zachariah Brown* "is entitled during his life to a moiety of the income arising from the residue of his father's estate, after payment of an annuity of 40*l.* bequeathed by the will, and that the residue amounted to 4000*l.*, which was invested in real securities, bearing 5 per cent. interest."

On the 8th of *February*, Mr. *Patten* wrote again, requesting an abstract of the titles of the estates on which the money was secured. "Be so good," he adds, "as to say on what days in the year the interest is payable, and to what time Mr. *Brown* has received it, and if there be any other deduction from the interest-money than the property tax."

Mr.

Mr. *Unthank*, in his answer, dated the 10th of *February*, refuses to disclose the titles of the mortgagors without their permission; and then adds, "The interest of the principal mortgage is paid half-yearly, in *June* and *December*; and at those times I have usually divided the surplus of the interest of the residue of the late Mr. *Brown*'s property between Mr. *Z. Brown* and his sister, which was done in *December* last. There is no other deduction made from the interest than the property tax, except that I have deducted from Mr. *Z. Brown*'s moiety the postage of letters I have received from him. The will of Mr. *Brown* furnishes all the information that can be necessary for preparing an assignment of the interest and annual produce of one moiety of his residuary property from his son; the date of the assignment from whom will of course determine the period from which I shall have to account for the interest to the assignee. I see no reason why the executors should become parties to the proposed assignment, which, Mr. *Z. Brown* having an undoubted right to make, requires no confirmation from them; but, for myself, I do not choose in any way to express my approbation of it, though I shall as readily pay the interest to his assignee as I should do to him, if he were not to part with it."

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Further communications took place between Mr. *Patten* and Mr. *Unthank*, with respect to the securities on which the money was invested; and this part of the correspondence is terminated by a letter from Mr. *Unthank*, dated the 1st of *March*, in which he states, that he has not the least reason to suppose that there were any outstanding demands on the estate of the late Mr. *Brown*.

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This correspondence affords a complete answer to a topic which was strenuously urged in favour of the Plaintiffs. It was said that *Hall* had not exercised due diligence; for that the question—whether there was any prior incumbrance on the fund—was not put directly either to *Brown* or to the executor. And it is true that the question was not put in express words; but was it not put in substance? The inquiries were such as drew from *Unthank* what is tantamount to an assurance that there was an absolute title in *Brown*; and if *Unthank* had received any intelligence of a prior incumbrance, and yet had acted and written in the manner in which he has, he would have involved himself in all the responsibilities which would affect an individual, who should stand by and see another person, upon the faith of the representations made by him, entering into a contract and parting with his money on the supposition that a certain fund, known by him, who so stood by, to have been already pledged, was free from incumbrances. When Mr. *Unthank* was asked whether there was any deduction from the interest-money except the property tax, would he, if the assignments to *Dearle* and *Sherring* had been notified to him, have answered, “There is no other deduction from the interest, except the property tax?” When Mr. *Unthank* said in one of his letters, that the date of the assignment would determine the period from which he would have to account to *Hall* for the interest, that was in fact a statement that he was thenceforth to account to no person else; and he could not have spoken of himself as liable to account for the whole of the interest to *Hall*, if he had known that he was to account for part of it to *Dearle* and *Sherring*. The very first letter addressed to the executor, calling for an abstract of *Brown*’s title, the amount of the residue, and the sum which was then paid yearly to *Brown*, was in fact a request to the
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executor to communicate every information, of every circumstance relating to the fund, which it could be of importance to a purchaser to know.

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With respect to the circumstance that the question was not put directly to *Brown*, he covenants in the deed of assignment that the fund was free from incumbrances; and, consequently, the necessity of making inquiries of him was superseded.

These proceedings are antecedent to the execution of the contract. After so much precaution, the assignment of *Brown's* interest is executed; and *Hall* pays the purchase-money. Does he content himself with remaining in this situation? After having given notice to the legal holder of the fund, and having obtained from him an engagement to pay the interest to him, *Hall*, as readily as it had been before paid to *Zachariah Brown*, *Hall* is let into possession. Mr. *Unthank* fulfils his promise; having become a trustee for a new *cestui que trust*, he accounts to him, and, in *July* 1812, pays over to him his share of the income of the residuary fund: thus, *Hall* is actually admitted into the enjoyment of the thing which had been assigned to him. On the 6th of *July*, *Unthank* writes a letter to *Patten*, in which he says, "As I have not been instructed as to the means by which Mr. *Hall* wishes to have his moiety of the interest of Mr. *Brown's* residuary estate conveyed to him, I have enclosed you a draft for 3*l.* 19*s.* 10*d.*, belonging to him, and now in my hands." He then goes on to render an account, to shew, that, as a trustee, he has accounted to his *cestui que trust* for all that was in his hands; and he begs Mr. *Patten* to communicate to him Mr. *Hall's* orders, "if you would have me in future make any remittances directly to him." Thus, Mr. *Unthank* becomes virtually a party to the transaction, giving *Hall* all the assurance

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a purchaser could have. Such is the contrast between the conduct of the subsequent incumbrancer and of the incumbrancer who stands first in point of time.

Some months afterwards, on the 17th of *October* 1812, *Dearle* and *Sherring* caused notice of their annuities to be given to the executors; accompanied with an intimation that the 93*l.* a year must not be paid any longer to *Hall*, inasmuch as they were entitled to have their demands first satisfied out of it. Upon receiving that notice, the executors, acting like cautious men, who thought that it was not for them to enter into any contest, stayed their hands, and did not make any further payment; but, had the notice not been given, they would have continued to have paid the interest of the moiety of the residue to *Hall*.

The present suit was instituted on the 17th of *June* 1819, six years and a half after the date of the notice, when ten years had elapsed from the date of *Sherring's* assignment, and eleven, from the date of the assignment to *Dearle*, and long after a former bill had been dismissed for want of prosecution: and what the Plaintiffs seek by this new suit is, — that a court of equity shall, at this remote period, interpose to stop the 93*l.* a year from being paid to *Hall*, to throw upon him the loss which must be sustained by some one or other, and to direct the fund to be applied in satisfaction of the arrears and growing payment of their annuities.

The ground of this claim is priority of time. They rely upon the known maxim, borrowed from the civil law, which in many cases regulates equities — “*qui prior est in tempore, potior est in jure.*” If, by the first contract, all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide.

decide. But it cannot be contended that priority in time must decide, where the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way, when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the *puisne* purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted. The question here is, — not which assignment is first in date, — but whether there is not, on the part of *Hall*, a better title to call for the legal estate than *Dearle* or *Sherring* can set up? or rather, the question is, Shall these Plaintiffs now have equitable relief to the injury of *Hall*?

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What title have they shown to call on a court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a Plaintiff to be heard in a court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is not, as in *Evans v. Bicknell*, whether a court of equity is to deprive the Plaintiffs of any right — whether it is to take from them, for instance, a legal estate, or to impose any charge upon them. It is simply, whether they are entitled to

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relief against their own negligence. They did not perfect their securities; a third party has innocently advanced his money, and has perfected his security as far as the nature of the subject permitted him: is this Court to interfere to postpone him to them?

They say, that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he, with whom you are dealing, is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of *England* has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If, therefore, an individual, who in the way of purchase or mortgage contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall v. Rowles (a)*, before Lord *Hardwicke* and three of the Judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised, even in courts of law.

(a) 1 *Ves. sen.* 348. 1 *Alk.* 165.

In *Twyne's* case (*a*), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences.

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“When a man,” says Lord *Bacon* (*b*), “is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued.”

It is true that a chose in action does not admit of tangible actual possession, and that neither *Zachariah Brown* nor any person claiming under him were entitled to possess themselves of the fund which yielded the 93*l.* a year. But in *Ryall v. Rowles* the Judges held, that, in the case of a chose in action, you must do every thing towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession, and under the absolute control, of another person.

Is there the least doubt, that, if *Zachariah Brown* had been a trader, all that was done by *Dearle* and *Sherring* would not have been in the least effectual against his

(*a*) 3 *Rep.* 80.

(*b*) *Maxims of the Law*, max. 16.

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assignees ; but that, according to the doctrine of *Ryall v. Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title, — to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary ; for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated : you had priority, but that priority has not been followed up ; and you have permitted another to acquire a better title to the legal possession. What was done by *Dearle* and *Sherring* did not exhaust the thing. (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he, who does not obtain such possession, must take his chance.

I do not go through the cases which constitute exceptions to the rule, that priority in time shall prevail. A man may lose that priority by actual fraud or constructive fraud ; by being silent, for instance, when he ought to speak ; by standing by, and keeping his own security

security concealed. By such conduct, even the advantage of possessing the legal estate may be lost.

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The principle, which I have stated, is recognized in many authorities. In *Evans v. Bicknell* Lord Eldon says (a), "If in this case I could be perfectly satisfied that the intention was, according to the allegations in this bill, taken altogether, that he might represent himself as entitled to credit as owner of the premises, and obtain credit in his trade by representing himself as owner of the premises, and that *Bicknell* acceded to that purpose, so understood, I should be strongly disposed to hold *Bicknell* liable to the extent in which *Stansell's* holding himself out as owner had involved a third party."

The case of *Wright v. Lord Dorchester* (b), though a qualified and conditional determination, and made without prejudice to a final decision, yet, considering the known habits and caution of the great Judge by whom that interlocutory order was pronounced, and the weight due even to the first impressions of his Lordship, is entitled to considerable authority. The preference given in that case to the *puisne* incumbrancer, who had made inquiry of the trustees, over the prior incumbrancer, who had not, must have proceeded on the principle which I have applied to the present case. The *puisne* incumbrancer was not put into permanent possession in that case by a power of attorney to receive the dividends, more than by actual payment of the current interest in the present case, and a promise of regular payment in future.

In *Ryall v. Rowles* (c), Lord Hardwicke puts his opinion principally on the ground, that, when a vendor

(a) 6 Vesey, 192.

(b) *Infra*, p. 49.

(c) 1 Vesey sen. 371. 1 Atkins. 182.

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is left in possession of that which he has disposed of, he "gains a delusive credit by a false appearance of substance." (a) "I will not say," he observed, "but some inconveniences may arise on each part. ... But this I will say, that very great inconveniences may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when, perhaps, they have not one shilling of the property in them." Mr. Justice *Burnet* said (b), "Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud, where left in his hands. ... It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit: and it is the same, whether in absolute or conditional sales. ... If the conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods; and, therefore, should come in the same case with other creditors, especially as he has been the bait to draw other creditors in." Then he argues, with respect to the assignment of a bond-debt or other chose in action (c), "Why is not delivery as requisite on such an assignment, as a delivery in the conveyance of a thing in possession? ... Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself at law? ... The debt, by the assignor's continuing it in his hand, is in his order and disposition, as he may receive the money due, and cancel the bond, and assign it over to another creditor; and cannot have this bond, but by consent of the true owner in equity; and, therefore, as he is not obliged to

(a) 1 *Atkins*. 185.(b) 1 *Ves.* sen. 360, 361.(c) 1 *Ves.* sen. 362, 365.

accept

accept a defective security, it is his own fault. As to bulky goods, the means of reducing into possession has been held sufficient: why not, then, in the case of a chose in action?"

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Lord Chief Baron *Parker* expresses himself thus (a): "It is said, there can be only an equitable assignment of a chose in action: which is true; and yet, in case of bonds assigned, (for bills of exchange, or promissory notes, are assignable at law,) they must be delivered; and such delivery of the bond, on notice of assignment, will be equivalent to the delivery of the goods; for the debtor cannot afterwards justify payment to the assignor, *Domat. lib. I.* This clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee; for no notice appears to be given." So Lord Chief Justice *Lee* spoke "of an honest creditor or mortgagee," who has had a conveyance made to him for valuable consideration, but "is not to have any preference to another creditor, because he does not give notice to other creditors, by having that delivery to him to which he was entitled." (b)

I cite

(a) 1 *Ves.* 367. This passage of the judgment of the Lord Chief Baron is given by *Atkyns* (1 *Atk.* 177.) in the following words: — "If a bond is assigned, the bond must be delivered, and notice must be given to the debtor; but in assignments of book-debts, notice alone is sufficient, because there can be no delivery; and such acts as are equal to a delivery of goods which are capable of delivery. *Domat. l. i. t. 2. s. 2. par. 9.* says, 'Things incorporeal, such as debts, cannot properly be delivered.' This is to shew the nature of assignments of debts by notice to the debtor. This clause, therefore, extends to things in action; and all has not been done that might have been done by the assignee to vest the right of them in himself, and to take away from the bankrupt the power and disposition of them, for no notice has been given to the debtors."

(b) 1 *Vesey*, sen. 369.

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I cite these authorities to shew, that, in assignments of choses in action, notice to the legal holder has always been deemed necessary; and it would be very dangerous for the solicitor of the purchaser to neglect it. A solicitor, who should neglect it, would find it difficult to make out, that he had not become responsible to his client.

It was said that *Hall* had himself been negligent; for he had not searched in the enrolment-office, where he would have found memorials which would have given him notice of these incumbrances. I answer, that *Hall*, in contracting for the purchase of *Brown's* life-interest, was not in any respect called upon by the nature of the transaction to search for memorials of annuities. If the fund could not have been transferred or incumbered without a memorial, he would have been bound to search in the enrolment-office; but there was nothing to lead him to search in that quarter; and the transfer of an interest in the 93 $\frac{1}{2}$ l. did not, taken by itself, call for a memorial. How, then, could he be expected to look for documents which had no natural connection with the transference of the fund? It was the mere accident that the prior charges had been created by way of security for the payment of annuities, which caused memorials to be made; and memorials would have been equally necessary, if the annuities had not been secured on the fund in question. It would be too much to impose on a purchaser the obligation of making a search, to which there is nothing to lead him. In affairs of great importance, a careful individual would probably search every where. But it is impossible to say, that Mr. *Hall* was bound to conjecture, that *Brown* had raised money by granting an annuity, and had secured that annuity by pledging his life-interest under his father's will.

On

On these grounds, I think that the Plaintiffs have not shewn a title to call on a court of equity to interpose in their behalf, and to take the fund from an individual who has used due diligence, in order to give it to those whose negligence has occasioned all the mischief. There is no equality of equities between the Defendant *Hall*, and the Plaintiffs.

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What opportunities of fraud would be afforded, if a party, who, having obtained an equitable conveyance, conceals it from every body, and lies by for years, while intermediate transactions are taking place, could at any time come forward with his secret deed, and say to a subsequent purchaser, who had advanced his money in ignorance of the existence of such a claim, "My deed is in date prior to yours; and, therefore, whatever may have been my negligence, or your diligence, the property belongs to me." Good sense, reason, authority, and equity are all on the other side.

The bill, therefore, must be dismissed, but, as against *Hall*, without costs. I do not make the Plaintiffs pay costs to *Hall*, because they may have been losers without any intention to commit a fraud, and I am unwilling to add to their loss. Constructive fraud is the utmost that can be imputed to them.

I may mention, further, that the language of text writers (though, of course, I do not refer to them as authorities) shews, that the rule, as I have stated it, is in accordance with what has been the current practice and the understanding of the profession on the subject of priorities. "On the mortgage of a chose in action," says one of the text writers (a), "it should never be

(a) *Powell's Law of Mortgages*, by Coventry, p. 451. note T.

omitted

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omitted to give notice of the transfer to the trustee ; for, upon the authority of the cases quoted in the text, *Tourville v. Nash*, 3 *P. Wms.* 308., and *Stanhope v. Verney*, *Butl. Co. Lit.* 290. *b. n.* (1.) s. 15., it has been thought, (and indeed, as it should seem, with a great degree of reason), that, if a mortgagee of this equitable right neglect to give notice of his incumbrance to the trustee, and such equitable right be afterwards assigned to a second mortgagee, who takes the precaution of giving the trustee proper notice, the first mortgagee will be postponed."

1824.
 February 5.

There was some discussion concerning the minutes of the decree. The result was, that His Honour ordered the costs of *Unthank* and his co-trustees to be paid by the Plaintiffs ; and the fund in court to be paid to *Hall*.

"His Honour doth order and decree, that the 919*l.* 2*s.* 5*d.* 3 per cent. bank annuities, standing in the name of the accountant-general, in trust in this cause, be transferred to the Defendant *Joseph Hall* : and it is ordered, that thereupon the Plaintiff's bill do stand dismissed out of this Court as against the Defendants, *William Unthank* and *Ann Bircham*, with costs, to be paid by the Plaintiffs, &c., and without costs as against the several other Defendants."


Reg. Lib. 1823. A. 1102.

From this decree the Plaintiffs appealed.

IN *LOVERIDGE v. COOPER* a similar question arose, under the following circumstances : —

Robert

Robert Johnson, by his will, bearing date the 31st of *August* 1802, directed, that his trustees and executors should stand possessed of a sum of 12,500*l.* 4 per cent. bank annuities, upon trust to pay the annual sum of 500*l.*, being the dividends of the 12,500*l.* 4 per cent. bank annuities, into the hands of his wife, *Ann Johnson*, during her life; and, after her decease, upon trust, to transfer 6250*l.* 4 per cent. bank annuities, being one moiety of the fund, and all the dividends thenceforth to grow due on the same, unto and equally amongst all and every the sons who should be then living, of the testator's brother, *Richard Johnson*. The testator appointed *John Cooper*, *Robert Robson*, and *William Gibson*, trustees and executors of his will. He died in 1803; and his will was proved by his three executors at his death. His brother, *Richard Johnson*, had four sons living.

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In *September* 1816, *John Harrison Loveridge* and *Robert George Arrowsmith*, being trustees of a sum of money for the separate use of *Elizabeth Wright*, the wife of *James Wright*, entered, at the request of her and her husband, into a contract with *Richard Johnson*, one of the four sons of the testator's brother, for the purchase of a redeemable annuity of 24*l.*, payable quarterly during the life of *Richard Johnson*. The annuity was to be secured by the joint and several bond of *Richard Johnson* and of *John Wall* as a surety, and by an assignment of a part of that one fourth share of the 6250*l.* 4 per cent. bank annuities, to which *Richard Johnson* was then entitled in reversion expectant on the death of the testator's widow and subject to the contingency of his surviving her. To carry this agreement into effect, an indenture was executed, bearing date the 5th of *September* 1816, by which it was witnessed, that, in consideration of 2000*l.* paid to *Richard Johnson* by *John Harrison Loveridge*

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Loveridge and Robert George Arrowsmith, at the request of *James Wright and Elizabeth Wright* his wife, *Richard Johnson* and *John Wall* did, jointly and severally, covenant, that they or one of them, and the heirs, executors, and administrators of them, or one of them, should pay or cause to be paid to *John Harrison Loveridge* and *Robert George Arrowsmith*, their executors, administrators, and assigns, during the life of *Richard Johnson*, an annuity of 24*l.* by equal quarterly instalments. It was further witnessed, that *Johnson* did grant, assign, and confirm unto *John Harrison Loveridge* and *Robert George Arrowsmith*, their executors, administrators, and assigns, the capital sum of 700*l.* 4 per cent. bank annuities, being part of the share of the 6250*l.* stock to which he was then entitled in remainder, expectant on the decease of *Ann Johnson*, and also all the dividends and annual produce which should become payable in respect of the said 700*l.* after the decease of *Ann Johnson*, and all the right, interest, property, claim, and demand of him *Richard Johnson* in and to the said sums, to have, receive, and take the same to them, their executors, administrators, or assigns, in trust for securing the payment of the annuity of 24*l.* pursuant to the covenant. It was then declared, that, in case the annuity should at any time be in arrear by the space of one calendar month, they, their executors, administrators, or assigns, might make sale of the 700*l.* 4 per cent. bank annuities, or any portion thereof, and that, out of the monies thence arising, they should pay the expenses incurred in the execution of the trusts, retain and discharge all arrears of the annuity, and, after payment of such arrears, invest the residue of the money in the public funds, in trust, by sale or other disposition thereof, or of any part thereof, to pay from time to time so much of the annuity as should not be paid pursuant to the covenant. By the same indenture, *Johnson* appointed *Loveridge* and *Arrowsmith*,
and

and each of them, their executors, administrators, and assigns, his attorney or attornies, for compelling a transfer of the stock thereby assigned.

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No notice of this indenture, or of the transaction to which it related, was communicated to any of the trustees of the testator's will, till the 29th of *April* 1818.

On the 24th of *August* 1819, the annuity, being then considerably in arrear, was assigned to *Henry Loveridge*, by a conveyance which purported to be made in consideration of 200*l.*, and to which *John Harrison Loveridge* and *Robert George Arrowsmith*, as well as *Wright* and his wife, were parties.

In 1821 the testator's widow died, and, shortly afterwards, a notice in writing of the indenture of the 24th of *August* 1819 was served on *Cooper*, the surviving trustee and executor under the will. The notice stated, that the annuity was in arrear from the 5th of *June* 1818, and required *Cooper* to stand possessed of the 700*l.* 4 per cent. bank annuities, and the dividends thereof, upon the trusts of the indenture of the 5th of *September* 1816.

Shortly after the grant of the annuity, *Johnson* entered into a contract for the sale to *William Hodges* of his interest in the one fourth share of the 6250*l.* stock. This contract was carried into execution by a deed dated the 3d of *December* 1816, by which *Richard Johnson*, in consideration of 600*l.*, assigned to *William Hodges* the sum of 1562*l.* 10*s.* stock, being his one fourth part of the 6250*l.* 4 per cent. bank annuities, and all the dividends which should accrue due thereon after *Ann Johnson's* decease; and he appointed *Hodges* his attorney for the purpose of calling for a transfer of the

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stock and receiving the money. The deed contained also a covenant, on the part of the vendor, that he had not previously assigned or incumbered the fund. Before this deed was executed, or the purchase-money paid, the solicitor of *Hodges* had inquired of *Cooper*, the surviving trustee, whether there was any charge or incumbrance on the interest of *Richard Johnson* in the 6250*l.* stock; and received for answer, that he, *Cooper*, knew of no such charge or incumbrance. On the 28th of *March* 1817, a copy of the indenture of the 3d of *December* 1816 was sent to *Cooper*.

Under these circumstances, *Cooper*, when applied to by the persons claiming under the indenture of the 5th of *September* 1816, refused to apply any part of *Richard Johnson's* share of the stock in discharge of the arrears of the annuity; and the bill was filed by them for the purpose of having the 700*l.* 4 per cent. bank annuities transferred, in order to secure payment of the annuity, and of having the dividends, which had accrued due on that amount of stock since *Ann Johnson's* death, applied in discharge of the existing arrears. It charged that the assignment to *Hodges*, if ever made, was subsequent in date to the indenture of the 5th of *September* 1816, and insisted, that, in consequence of this priority of date, the persons claiming under the indenture of the 5th of *September* 1816 were entitled to the possession of the fund in preference to all other persons.

Hodges claimed priority, in consequence of having given notice of his claim to the legal holder of the fund, before notice was given of any other incumbrance.

Cooper, the surviving trustee at the time when the transaction took place, stated by his answer, that the first notice of the indenture of the 5th of *September* 1816
was

was received by him on the 29th of *April* 1818; that a second notice was served on him on the 11th of *April* 1821; that, previously to the month of *December* 1816, the solicitor of *Hodges* applied to him to be informed, whether he knew of any charge or incumbrance made by *Richard Johnson* upon his interest in the sum of 6250*l.* four per cent. bank annuities; and that he, in answer, informed the solicitor, as the fact was, that he, *Cooper*, knew of no such charge or incumbrance.

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The cause was heard before Sir *Thomas Plumer*, and he ordered that it should be again argued by one counsel on each side.

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July 8.

The question was argued by Mr. *Shadwell* for the Plaintiffs, and by Mr. *Wingfield* for the Defendant *Hodges*.

December 8.

The MASTER of the ROLLS.

This case is very similar to the last, and has so many circumstances in common with it, that all the observations, which I have made in *Dearle v. Hall*, will apply here. I shall advert to the material circumstances of it, in order to shew that there is no ground for distinguishing the one from the other. It is of the utmost importance to the interests of mankind, that plain and clear rules of property should be laid down, and, when laid down, that they should not be frittered away by nice and frivolous distinctions.

December 26.

In *September* 1816, *Richard Johnson* had, under the will of his uncle, a contingent reversionary interest in one fourth of 6250*l.* four per cent. stock — contingent upon the event of his surviving the testator's widow,

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who had a life-interest in that and some other funds. In that month, Mr. and Mrs. *Wright* contracted with *Richard Johnson* for the purchase of an annuity, which, it was agreed, should be secured by a transfer of his contingent reversionary right. On the 5th of *September* the consideration-money was paid; the annuity was granted to trustees for Mr. and Mrs. *Wright*; and 700*l.* four per cent. bank annuities, part of the stock to which the grantor was to become entitled on the death of the widow, was assigned to the same trustees for securing due payment. The stock was then standing in the name of *Cooper*, the surviving trustee and executor of the testator; and though the bill alleges that notice was immediately given to him, the fact unquestionably is, that no immediate notice of the assignment was given to him. In 1818, the annuity fell into arrear; and, in *August* 1819, Mr. and Mrs. *Wright* and their trustees transferred the annuity to one *Loveridge*, who is represented as having become the purchaser of it for the same nominal sum which had been originally paid for it. It is somewhat difficult to conceive how he could be induced to give that price, when we consider the irregularity of the past payments of the annuity, and the circumstances which had taken place in the mean time.

The tenant for life of the fund died in *April* 1821: and, upon that event, *Richard Johnson* became entitled to the 1562*l.* 10*s.* stock.

The case made on the part of the Plaintiff is, priority of title under the assignment of *September* 1816 and the subsequent conveyance; and he prays the assistance of the Court to prevent the stock from being transferred to *Hodges*, who claims under a subsequent assignment, and to compel a transfer of it to the Plaintiff himself.

The

The answer, which *Hodges* makes, is this, — that, before the executor, in whose name the stock was standing, had any notice of the assignment of *September* 1816, he, *Hodges*, purchased the whole of *Johnson's* interest in the fund, had an assignment of it to him duly executed, and notified that assignment to *Cooper*, the trustee and executor. The assignment to *Hodges* was executed in *December* 1816; and, before the purchase was made, his solicitor was assured by *Cooper*, that he, *Cooper*, knew of no charge or incumbrance on the property. On the 28th of *March* 1817, a copy of the indenture of *December* 1816 was delivered to *Cooper* on behalf of *Hodges*; verbal notice having been previously given.

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It appears, that, on the 29th of *April* 1818, notice was, for the first time, given to *Cooper* of the assignment of *September* 1816; and, on that occasion, *Cooper* writes to *Hodges* a note, in which he states that he had received such a notice, (it was from *Arrowsmith*, one of the trustees for Mr. and Mrs. *Wright*,) and that he had told *Arrowsmith* in reply, that there had been an assignment of the stock to *Hodges*, of which he, *Cooper*, had received notice long before. It is most extraordinary that *Arrowsmith* should have thus received, in 1818, notice of the transfer to *Hodges*; and yet, that, in the following year, the annuity should be sold for its full original price.

Independently of that circumstance, however, this case cannot in principle be distinguished from the last. The purchase in *September* 1816 not having been followed by notice, all the observations, which I have before made on that subject, apply to it. On the same principles on which I determined the other case, I must decide here, that *Loveridge* has made out no title to relief in a court of equity.

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Therefore, let the bill be dismissed with costs as against the trustee, *Cooper*, and without costs as against the Defendants, *Hodges* and *Johnson*.

The Plaintiffs appealed against this decree.

Before the
Lord Chan-
cellor.

1827.
May 8.

The appeal in *Loveridge v. Cooper* came first to a hearing.

Mr. *Shadwell* and Mr. *Sidebottom*, for the Appellants.

If a person, possessed of a present equitable interest in a fund, the legal dominion over which is in a trustee, executes an equitable assignment of it for valuable consideration to a purchaser who does not give notice to the trustee, and the same person afterwards assigns it for valuable consideration to another purchaser, who gives notice to the trustee, a question arises, which of the two purchasers, under such circumstances, has the preferable title to the fund? That, however, is not the precise question which arises in this case; for the decision of that abstract point in favour of the second purchaser would not entitle the second purchaser to a preference here; but it is connected with it thus far, that, if the abstract point be decided in favour of the first purchaser, the decree, against which the Plaintiffs have appealed, must fall to the ground.

The general rule between incumbrancers and purchasers is, *Qui prior est in tempore potior est in jure*; and he, whose assignment is first in order of time, has, by virtue of that circumstance alone, the better right to call for the possession of the fund. To postpone him, where real estate is in question, there must be established
against

against him a case of fraud, or of negligence so gross as to amount to fraud; and the same rule must apply to purchasers of equitable interests in personal chattels. The purchaser of an equitable interest in stock or money, in omitting to give notice of his purchase to the trustee in whose name the fund stands, is not chargeable with greater negligence, and does not give his vendor a greater opportunity of committing a fraud, than a mortgagee who permits the mortgagor to retain, or afterwards gives him, possession of the title-deeds. And,—though Mr. Justice *Buller* has said (*a*), “It is an established rule in a court of equity, that a second mortgagee, who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money upon mortgages without taking the title-deeds, he enables the mortgagor to commit fraud —” yet *Peter v. Russell* (*b*), *Evans v. Bicknell* (*c*), and a variety of other cases, shew that no such rule exists or has existed in a court of equity. “The doctrine,” says Lord *Eldon*, in *Evans v. Bicknell*, “at last is, that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or the gross negligence, that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee.” In another case, on the 29th of *January* 1802 (*d*), Lord *Eldon* said, “There is no case in which it has been held, that the mere circumstance of the first mortgagee not taking the title-deeds will entitle the second, who has gotten the deeds, to be preferred to him.” The question, therefore, is, Have the Plaintiffs here been guilty of fraud, or

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(*a*) *Goodtitle v. Morgan*,
1 *T. R.* 762.

(*b*) 1 *Eq. Cas. Ab.* 321. 2 *Vern.*
726. *Gillb.* 122.

(*c*) 6 *Ves.* 190. See also *Martinez v. Cooper*, 2 *Russell*, 198.

(*d*) Mr. *Shadwell* cited this case, which was anonymous, from a MS. note taken by himself.

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or of gross negligence amounting to evidence of fraud? There is not so much as an attempt to impute fraud to them; and the omission to give notice cannot be evidence of a fraudulent intention, where it is admitted that no fraudulent intention existed. Even if the omission to give notice exposed the Plaintiffs to an imputation of negligence, the cases shew that mere negligence is not sufficient to postpone a party who has the first conveyance.

It is not the duty of the purchaser of an equitable interest in stock to give the trustee notice of his purchase; no case can be cited which imposes on him such an obligation. Notice to the trustee does not improve or complete the title of the purchaser, except so far as it is a step towards insuring to him the possession of the fund, by preventing the trustee from parting with it in the mean time. If, indeed, in consequence of the omission to give notice, the trustee were to transfer the fund to a second purchaser, the first purchaser would necessarily lose the benefit of his purchase; for he would have no ground for depriving the second purchaser of the possession which had been honestly obtained; neither would he have any ground for attacking the trustee in a court of equity. To avoid this risk, it is prudent to give notice; but the omission to give notice is not gross negligence; and so long as the fund remains in the hands of the trustee, the right to the possession must depend on the priority of assignment, without regard to priority of notice to the legal holder. A subsequent purchaser has no right to complain of the first purchaser for not giving notice. Every man, who deals for an equitable interest in a personal chattel, deals for it subject to all the equities which affect it; and he relies for his security on the covenant of his assignor.

No authority can be adduced for the proposition, that a prior purchaser is to be postponed, merely because he
has

has omitted to give notice of his purchase : the absence of any such authority shews that the general rule, that priority of time gives priority of right, must prevail. Many transactions of this kind must have taken place ; but the parties have acquiesced in that obvious and natural rule, and the subsequent purchasers have looked for their remedy to those by whom they have actually been defrauded.

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But, even if the general question were to be decided in favour of the principle on which the decree of the Master of the Rolls proceeded, there are circumstances which distinguish this case, so as to take it out of the control of that principle. The interest of *Richard Johnson* in the fund was contingent and reversionary ; and neither he, nor any person claiming under him, could be entitled to the possession during the life of the testator's widow. Notice to the legal holder is only a step towards possession, and a means of preventing him from parting with the possession ; and, though notice may be useful where the possession may, at any moment, be parted with by the trustee, why should notice be given, where the possession could not be parted with ? Notice is a warning to the trustee not to part with the fund, until he has examined whether the person giving notice is not the person entitled to it : here the trustee could not part with the stock during the life of *Ann Johnson* ; and, therefore, even if notice were requisite, it was sufficient to give notice upon her death, or within a reasonable time afterwards. In fact, notice of the Plaintiffs' incumbrance was given during *Ann Johnson's* life.

If there is blame in not using the utmost possible diligence and precaution, *Hodges* is in no better situation than the *Loveridges* or the *Wrights*. If they omitted to inquire of the trustees, or to give them notice, he omitted

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omitted to inquire of *Richard Johnson*, the vendor, whether there were any prior incumbrances. Had he made that inquiry in direct words, he might have come to the knowledge of the existence of the former incumbrances.

The Plaintiffs do not ask for the assistance of a court of equity to deprive *Hodges* of any thing which he has gotten. He is not in possession of the fund; it is still in the hands of the trustee, who is not entitled to retain it, but must pay it over, either to the Plaintiffs, or to *Hodges*: it is for the Court to direct to whom the payment shall be made; the Court, therefore, must interfere, in favour either of the one party or the other; and it ought to interfere in behalf of the assignment which has priority in time. Equity will in this case follow the law. If the bill of the Plaintiffs is dismissed, the Court declares that it will not interfere on their behalf; and that will in effect be a declaration that the trustee ought to transfer the fund to *Hodges*.

Mr. Sugden and Mr. Treslove, for *Hodges*.

The decree, against which this appeal has been presented, has done no more than follow what has long been the general understanding of the profession, and adopt a rule which has been long sanctioned by the practice of the most able conveyancers. (a) Whoever means to be safe, in dealing

(a) Mr. Sugden's *Treatise on the Law of Vendors and Purchasers* (edition 1822) contains the following observations on this subject:—"A purchaser of any equitable right, of which an immediate possession cannot be obtained, should, previous to completing his contract, inquire of the trustees, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser in consequence of the fraudulent statement. *Burrowes v. Lock*, 10 Ves. 470. When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly

dealing for an equitable interest in a personal chattel, must take two steps: before he completes his purchase, he ought to inquire of the trustees, whether they have notice of the existence of any incumbrance; if the answer is in the negative, and he goes on to complete his purchase, he ought then to give the trustees notice of his having done so, in order that he may fix their conscience with the knowledge of the fact, and be able to charge them with a breach of trust, if they transfer to any other person. By thus affecting the conscience of the trustees, he gains a better and a higher equity, than a prior purchaser who dealt with the vendor only, and made no communication to the trustees. It is a mistake to say that equities are to be marshalled by priority of date: equal equities may be marshalled according to the order of time; but the question first is, "Are the equities equal? And there are many cases of competition between two claimants having equitable titles, in which the subsequent purchaser was preferred, because he was held to have a better right to call for the legal estate than his adversary.

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certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also, perhaps, give the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution." Page 11.

"Upon the purchase of a *chose* in action, or of any equitable right, it is the invariable practice of the profession to require notice of the sale to be given to the

trustee. This, of course, binds his conscience. And notwithstanding the general rule, that, with respect to equitable right, *qui prior est tempore potior est jure* (a), it seems probable that equity would prefer a subsequent purchaser, who had given a proper notice to the trustee, to a prior purchaser, who had neglected to do so. At least, there is a case (b) which seems, in some measure, to authorise this conclusion." Page 700.

(a) See *Tourville v. Naish*, 3 P. Wms. 307., and see 2 P. Wms. 495., 15 Ves. 354., 2 Taunt. 415.

(b) *Stanhope v. Earl Verney*, Butler's n. (1) to Co. Litt. 290 b., and see 1 Ves. 367., 9 Ves. jun. 410.

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adversary. *Willoughby v. Willoughby* (a), *Stanhope v. Lord Verney*. (b)

If a rule contrary to the principle of the decree were to be adopted, such equitable interests would be placed *extra commercium* : no man could deal for them, because he could never know when he was safe, except so far as he could rely on the personal responsibility and good faith of the vendor. The owner might sell the property to a dozen different persons successively ; and if notice to the trustees be not required, or do not confer a higher title, none of them would have any means of knowing whether the property had been previously sold or incumbered. By requiring a purchaser, who desires to be safe, to give notice to the trustees, the vendor is deprived of the means of committing a fraud. The trustees are converted into a register ; and, by applying to them, every one, who proposes to negotiate for the purchase of the fund, (except in the very improbable event of the trustees incurring personal responsibility, by lending themselves to the vendor's dishonest purposes), is enabled to ascertain, whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him.

In a case like this, the loss must be borne either by the first purchaser or by the second. The latter has taken every precaution, which prudence suggested, to protect himself from fraud, and to deprive the vendor of the means of defrauding others. The former has omitted to take a step, which would have prevented all the mischief that has ensued : it is his negligence which has enabled the vendor to commit the fraud, the consequences of which must fall on either the one or the other. Is it not reasonable that the loss should be borne

(a) 1 T. R. 768. (b) 2 Eden, 81: Butler's note (1) to Co. Litt. 290 b.

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borne by him whose negligence has occasioned it, rather than by an innocent party, who has exercised a degree of diligence which would have saved him from being entangled in the difficulty, if the other had done all that a prudent purchaser ought to do? And why should the Plaintiffs complain? They made no inquiry as to the state of the property at the time when they took their security; they took the security, therefore, subject to any incumbrance which then affected it, or might affect it afterwards, before their title was complete. They might have made themselves secure: they did not choose to do so; and they must bear the consequences. The frame of the bill shews that they were aware that they had been guilty of an error; for they insert in it an allegation totally untrue, that notice of the assignment, under which they claim, was immediately given to the trustees.

Peter v. Russell, Evans v. Bicknell, and that class of cases, are not applicable to the present question. In them the contest was between two parties, of whom one had gotten the legal estate, and the other called upon the Court to deprive him of the benefit of that legal estate.

If the general rule be, that the purchaser of an equitable interest, who first gave notice to the trustee, is to be preferred to a prior purchaser who did not give notice, there can be no pretext for saying that the purchase of a reversionary contingent interest is to be an exception. It is precisely in such a case that notice becomes most necessary. Where the interest is such, that the purchaser has a right of immediate enjoyment, possession may be obtained without much delay; and the necessity of notice for his own protection and that of others is diminished. But where the interest is reversionary, there is no mode of completing the title, except by notice to the legal holders of the fund.

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It is ridiculous to attempt to found any argument on the circumstance, that *Hodges* did not formally inquire of *Johnson*, whether he had previously assigned or incumbered the property. *Johnson* conveyed an absolute interest: he represented himself as having full power to dispose of the fund as he pleased. What end could have been served by putting to him the formal question, — “Are your representations true?”

Mr. *Seton*, for the Trustee.

Mr. *Shadwell*, in reply,


In *Stanhope v. Lord Verney* nothing was decided, except that, two innocent purchasers having each a declaration of trust of an outstanding term in his favour, a court of equity would not prevent the party, who had obtained possession of the deeds, from availing himself of the term to defeat the claim of the other who had the first declaration of trust. No question arose there with respect to the operation of notice to a trustee, or of alleged laches in omitting to give notice. The only analogous authorities are the cases, of which *Evans v. Bicknell* is the leading one: priority of title to an equitable interest gives an advantage similar to that arising from the possession of the legal estate: a party may lose the benefit of either advantage, but he can lose it only by fraud, or by negligence amounting to fraud. In the absence of fraud, the prior equity is the better equity.

It has been very usual to give the trustee notice of an assignment by persons beneficially interested; but that step has been taken only for the purpose of preventing the trustee from parting with the fund, and not as necessary to the perfection of the title. By what process of legal reasoning can notice to a trustee be conceived to convert a second incumbrancer into a first, and a first into a second?

a second? Will notice have that effect, if it is not preceded by inquiry of the trustee, before the purchase-money is paid? If the answer is in the affirmative, the second purchaser will be preferred, though he has been guilty of as much negligence as is imputed to the first; and a formal act, required by no known law, done by him after his purchase-money has been paid on the mere faith of the vendor's representations, is to have the effect of giving his conveyance a higher operation. A second purchaser, some years after the completion of his contract, gives notice to a trustee to whom no earlier notice had been given: can that act entirely alter the relative rights, which, up to the moment of giving this notice, unquestionably subsisted between him and former incumbrancers? In the present case, notice was not given by *Hodges* till several weeks after the execution of the assignment to him; and, during this interval, he must have been postponed: how could he afterwards, by his own act, make his title better, to the prejudice of a prior *bonâ fide* purchaser for valuable consideration? If, on the other hand, inquiry, before the purchase is completed, be necessary, as well as notice after its completion, it is not the notice alone which has the mysterious operation of converting the last into the first; and as the inquiry does not convert the trustee of the fund into a trustee for the person who makes the inquiry, the principle of this decree falls to the ground, so far as it depends upon the notion, that a posterior equity becomes a better equity by the operation of certain acts in converting the legal holder of the fund into a trustee for him who claims under the posterior equity. Suppose a second incumbrancer makes inquiry of the trustees, but does not give them notice; or, suppose that, after the completion of the contract of the second incumbrancer who made such inquiry, but before he has given notice, a first incumbrancer, who made no previous inquiry, gives notice: how are the equities to be arranged under such circum-

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circumstances? A trustee may be abroad, or lunatic, so that notice cannot be given to him: the first incumbrancer may be in a distant country, while the second is on the spot, so that it may be physically impossible for the former to give the first notice; in other words, if this decree is right, it will be out of his power to secure any title to a fund unincumbered at the time of his purchase, and for which he has paid full value. There is no end to the difficulties which must arise, if once we depart from the plain rule, that the prior equity is to be preferred, except where it is vitiated by fraud, or negligence amounting to fraud.

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Before the
 Lord Chan-
 cellor.

The appeal in *Dearle v. Hall* was heard.

Mr. *Sugden* and Mr. *Phillimore*, for the appellants.

They urged the same topics, and referred to the same authorities, as were relied on by Mr. *Shadwell* in *Loveridge v. Cooper*. They further cited *Tourville v. Naish* (a); the dictum in *Brace v. The Duchess of Marlborough* (b), “That, in all cases where the legal estate is standing out, the several incumbrancers must be paid according to their priority in point of time;” and Lord *Thurlow*’s dictum in *Davies v. Austen* (c), “A purchaser of a chose in action must always abide by the case of the person from whom he buys: that I take to be an invariable rule.”

The negligence, said they, which was imputed to the Plaintiffs was merely this, that, having an incumbrance on a fund, they had omitted to take a step which might probably have been the means of bringing the existence of the incumbrance to the knowledge of intending purchasers. But where was the authority, which justified the court in

(a) 3 *P. Wms.* 307. (b) 2 *P. Wms.* 495. (c) 1 *Ves. jun.* 249.

imposing such a duty on an incumbrancer? The contrary doctrine was established by *Osborne v. Lea* (a), where it was held, that a person, having an incumbrance on an estate, was not bound to give notice of it to persons whom he knew to be in treaty for the purchase of the property.

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Looking merely at the comparative want of caution in the parties, the Plaintiffs were not more culpable than *Hall*. The enrolment of their annuities furnished to the whole world ample means of protection; and if *Hall* had searched at the enrolment-office, he would have found that he was purchasing a property which his vendor had previously parted with.

In the argument before the Master of the Rolls, a case of *Wright v. Lord Dorchester* * was cited as an authority

(a) 9 Mod. 96.

* The following were the material circumstances in *Wright v. Lord Dorchester*.—Mr. *Sturt* was entitled to a life-interest in a sum of stock standing in the names of Lord *Dorchester* and Mr. *Bouverie*; and, in 1793, assigned it, with other property, to *Wright*, as a security for the payment of two annuities. In 1795, he proposed to sell his interest in the stock to *Brown*, who, having inquired of the trustees, and being informed by them, that they knew of no incumbrance on the fund, completed his purchase: and the trustees executed a power of attorney to *Brown's* solicitor, under which the dividends were received and paid to *Brown* till 1801. In that year *Wright* filed a bill, and obtained an injunction to restrain the transfer of the stock and the payment of the dividends.

The answer of *Brown* stated the title under which he claimed; and that of *Sturt* alleged, that *Wright's* security was meant to comprehend nothing beyond certain real estates.

Upon the answer, Lord *Eldon*,

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thority for preferring a second incumbrancer, who had given notice, to a prior incumbrancer who had not given notice. The order made in that suit was merely interlocutory;

Eldon, in 1809, dissolved the injunction against the payment of the dividends, and ordered the dividends to be paid to *Brown*, upon his giving security to refund the amount, in case a decree should be made against him.

The order made in that cause was as follows:—

Between *John Wright*,
Ichabod Wright, *Francis*
Beresford, and *Francis*
Evans, - Plaintiffs;
 and


George Damer, Esquire,
 now Earl of *Dorchester*,
 and *Edward Bouverie*,
Charles Sturt, *Jonathan*
Brown, and the Governor
 and Company of the
Bank of England,

Defendants.

Whereas, by an order made in this cause, bearing date the 20th day of *July* 1801, it was, for the reasons therein contained, ordered, that the defendants, the Governor and Company of the Bank of *England*, should be restrained from permitting a transfer of the principal sum of

13,245*l.* 0*s.* 7*d.* bank 3 per cent. consolidated annuities, in the pleadings in this cause mentioned, and also from paying the interest or dividends due, or thereafter to grow due, on the said principal sum, until the defendants should fully answer the plaintiffs' bill, and this Court make other order to the contrary. Now, upon opening of the matter, &c. by Mr. *Leach* and Mr. *Bell*, of counsel for the defendant *Jonathan Brown*, it was alleged, that the plaintiffs exhibited their bill in this Court against the defendants, stating, among other things, that, some time previous to the 27th day of *December* 1790, the sum of 13,245*l.* 0*s.* 7*d.* 3 per cent. consolidated bank annuities was invested in the books of the Governor and Company of the Bank of *England*, in the names of the Honourable *George Damer*, afterwards Earl of *Dorchester*, and the Honorable *Edward Bouverie*, on certain trusts by some deed declared, and that the said *Charles Sturt* was entitled to receive

locutory ; and, though the dividends were directed to be paid to the second incumbrancer, he was required to give security to refund them, if the final decree of Court should not

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receive the dividends and interest thereof for the term of his natural life ; and that the said *Charles Sturt* had granted two annuities, amounting together to the sum of 2400*l.*, and had assigned to the plaintiff *John Wright*, his executors, administrators, and assigns, certain securities, including, among other things, the dividends of the 13,245*l.* 0*s.* 7*d.* upon the several trusts mentioned in an indenture, bearing date the 14th day of *March* 1793 ; that, afterwards, the said annuity of 2400*l.* was, by default of *Charles Sturt*, greatly in arrear, and, therefore, the plaintiffs applied for and obtained the order dated the 20th day of *July* 1801 ; — that the defendant *Jonathan Brown* hath put in his answer to the plaintiffs' bill, whereby he, among other things, saith, that the said *Charles Sturt*, having occasion for a sum of money in *June* 1795, applied to his, the defendant's, solicitor, to procure him the same, and proposed to sell his life-interest, which he was en-

titled to in the dividends of the said 3 per cent. bank annuities, amounting to the sum of 397*l.* 7*s.* ; that the said *Charles Sturt* then assured his, the defendant's solicitor, that the dividends were free from all incumbrances whatsoever ; that his solicitor did apply to the Earl of *Dorchester* and the Honourable *Edward Bouverie*, the trustees named in the marriage settlement of the said *Charles Sturt*, with Lady *Mary Ann Ashley Cooper*, in whom the said 3 per cent. consolidated bank annuities are vested, and that the said trustees informed his said solicitor, that they had not heard of or knew of any person entitled thereto, or who had made any claim thereto, to their knowledge or belief, except the said *Charles Sturt* ; that his said solicitor made the said trustees acquainted with the said treaty ; that, by indenture bearing date the 18th day of *June* 1795, the said *Charles Sturt*, for the considerations therein mentioned, assigned the dividends of the said 13,245*l.* 0*s.* 7*d.* 3 per cent. consolidated bank annuities

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not be in his favour. It is, therefore, evident, that Lord *Eldon* did not mean to decide the question in that stage of the cause.

Mr.

annuities to the said defendant for the term of the natural life of the said *Charles Sturt*; that the said *George Earl of Dorchester*, and the said *Edward Bouverie*, duly executed a power of attorney authorizing and empowering *John Claridge*, his, the defendant's, solicitor, to receive the interest and dividends of the said trust stock for the use of him the said defendant, as the same became due, and by virtue thereof the said *John Claridge* duly received the interest and dividends of the said trust-stock until *Midsummer* 1801, a period of six years or upwards, without any interruption or molestation by any person whatsoever;—that the said defendant *Charles Sturt* hath put in his answer to the plaintiffs' bill, and, among other things, saith, that whatever may have been the particular expressions introduced into the said several indentures in the bill mentioned, it was the true understanding and agreement between him, *Sturt*, and the plaintiffs, that the plaintiffs should have the security of

the real estates only granted to them, and, in order to prevent any doubt or misunderstanding what estates in particular belonging to him, the said defendant, were to be comprised in the grant of the annuity in the said plaintiffs' bill mentioned, a rental or schedule of such real estates of him, the said defendant, mentioned and intended as a security for the said annuity of 2400*l.*, was made out and approved by the said plaintiffs or their agents, or some of them, and the same rental or schedule was annexed to the said grant;—and therefore it was prayed, that the said injunction for restraining the Governor and Company of the Bank of *England* from permitting a transfer of the 13,245*l.* 0*s.* 7*d.* 3 per cent. consolidated annuities, and also from paying the dividends due, or thereafter to accrue due on the same, may be dissolved:—Whereupon, and upon hearing Sir *Samuel Romilly*, of counsel for the plaintiffs, and Mr. *Trower*, of counsel for the defendant the Honourable

Mr. *Horne* and Mr. *Barber*, for *Hall*.

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They followed the same train of argument, which had been urged by the defendant in *Loveridge v. Cooper* ;
and

able *Edward Bouverie*, and the said order, dated the 20th day of *July* 1801, read, and what was alleged by the counsel for the said parties,— and the defendant *Jonathan Brown*, by his counsel, undertaking to give security to be approved of by Mr. *Ord*, one of the Masters of this Court, to whom the cause *Portman v. Sturt* stands referred, to refund all dividends which he shall receive in respect of the bank annuities mentioned in the notice, until the hearing of this cause, after retaining the arrear of the property duty payable in respect thereof, in case the plaintiffs, or the defendants, the trustees, shall be declared to be entitled to such dividends,— upon the said *Jonathan Brown* giving such security, to be approved of by the said Master, his Lordship doth order, that the injunction granted in this cause, to restrain the defendants, the Governor and Company of the Bank of

England, from paying such dividends, be dissolved ; and it is ordered, that such dividends be received by the said *John Claridge*, on behalf of the said *Jonathan Brown*, by virtue of the letter of attorney given to him in the pleadings mentioned, until the hearing of this cause, or the further order of this Court : And it is ordered, that the plaintiffs do pay unto the defendant, the Honourable *Edward Bouverie*, the surviving trustee named in the indenture of settlement made on the marriage of the defendant *Charles Sturt* with Lady *Mary Ann Ashley Cooper*, bearing date the 11th day of *April* 1788, his costs of this suit up to this time, to be taxed by the said Master ; but such payment is to be without prejudice to any questions by whom the same are ultimately to be paid.*

Reg. Lib. B. 1808. fo. 420.

* It does not appear that the question came again before the Court in any subsequent stage of the cause.

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and further cited, *Burrowes v. Lock* (a), *ex parte Knott* (b), and *Wright v. Lord Dorchester*.

The order made in the last of these cases was, they argued, a direct authority on the point; for Lord *Eldon* would not have dissolved the injunction, and directed payment to be made to the second incumbrancer, if he had not had a clear and decisive opinion on the subject. It had been stated by one of the counsel who were concerned in that case, that the Lord Chancellor was of opinion, that the power of attorney, which was executed by the trustees to the solicitor of the second purchaser, was equivalent to a declaration of trust in his favour. Lord *Eldon* required that *Brown* should give security to refund the money, not because he had any doubt as to the law upon the facts as they were presented to the Court by *Brown's* answer, but because, when the cause came to a hearing, those facts might be displaced, and the Court might have then to adjudicate upon a totally different state of circumstances. *Brown* might fail in proving that he had made the inquiry, received the answer, and given the notice, which his answer insisted on; for the purpose of the motion to dissolve the injunction, the Court was to act upon the statements of the answer on those points; at the hearing, those statements would go for nothing; the decree would proceed merely upon the facts proved; and *Brown* was required to give security to refund, because it might happen that the facts proved in the cause would not coincide with the facts stated in his answer.


If the trustees had concurred in the assignment to *Hall*, who could have doubted that he would have acquired a priority, which could not have been taken away from him?

Though

(a) 10 *Ves.* jun. 475.

(b) 11 *Ves.* 609. 618.

Though they have not concurred in the assignment, and though he had no right to require them to concur in it, does not their promise to pay the dividends to him, — does not an actual receipt of a part of those dividends, — place him in the same situation, with respect to other claimants, as if the trustees had been parties to the deed? The plaintiffs do not pretend that they can recall from Mr. *Hall* the sums which he has received; yet, if they have the better title, their right ought to extend to the dividends which were paid to him as well as to the dividends accrued subsequently, which have remained in the hands of the trustees, or of the Court. Negligence is not imputable to *Hall* because he did not search for annuities. What was there to put him upon such inquiry? Who ever imagined, that every purchaser of an equitable interest in stock is to make a search at the enrolment-office, in order to ascertain whether his vendor has previously granted annuities. (a)

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The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, were decided by Sir *Thomas Plumer*; and from his decree there is, in each of them, an appeal, which stands for judgment. As the two cases depend on the same principle, though the facts are, to a certain degree, different, the better course will be to dispose of both together; and as *Dearle v. Hall* was the first of the two which came before the Court below, though it was not argued on appeal till after *Loveridge v. Cooper* had been heard, I shall first direct my attention to the facts on which it depends.

Zachariah

(a) *Wilks v. Beddington*, 2 Ver. 112, 113. 2 Ves. sen. 486. 1 Ball non, 599. *Frere v. Moore, & Beattie*, 171. 8 Price, 480. See also 18 Ves.

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Zachariah Brown was entitled, during his life, to about 93*l.* a year, being the interest arising from a share of the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money, and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor of the name of *Unthank*, who took the principal share in the management of the trust. *Zachariah Brown*, being in distress for money, in consideration of a sum of 204*l.*, granted to *Dearle*, one of the Plaintiffs in the suit, an annuity of 37*l.* a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, *Brown* assigned to *Dearle* all his interest in the yearly sum of 93*l.*: but neither *Dearle* nor *Brown* gave any notice of this assignment to the trustees under the father's will.

Shortly afterwards, a similar transaction took place between *Brown* and the other Plaintiff, *Sherring*, to whom an annuity of 27*l.* a year was granted. The securities were of a similar description; and, on this occasion, as on the former, no notice was given to the trustees.

These transactions took place in 1808 and 1809. The annuities were regularly paid till *June* 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, *Brown*, in 1812, publicly advertised for sale his interest in the property under his father's will. *Hall*, attracted by the advertisement, entered, through his solicitor, Mr. *Patten*, into a treaty of purchase; and it appears from the correspondence between Mr. *Patten* and Mr. *Unthank*, that the former exercised due caution in the transaction, and
made

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made every proper inquiry concerning the nature of *Brown's* title, the extent of any incumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to *Hall* of the existence of any previous assignment; and, his solicitor being satisfied, he advanced his money for the purchase of *Brown's* interest, and that interest was regularly assigned to him. Mr. *Patten* requested *Unthank* to join in the deed: but Mr. *Unthank* said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because *Z. Brown* has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to *Hall*; and, shortly afterwards, *Hall* for the first time ascertained, that the property had been regularly assigned, in 1808 and 1809, to *Dearle* and to *Sherring*.

Sir *Thomas Plumer* was of opinion, that the Plaintiffs had no right to the assistance of a court of equity to enforce their claim to the property as against the Defendant *Hall*, and that, having neglected to give the trustees notice of their assignments, and having enabled *Z. Brown* to commit this fraud, they could not come into this Court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as *Hall* had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said, that there was no authority for the decision of the Master of the Rolls — no case in point to support it; and certainly it does not appear that the precise question has ever been determined, or that it has
been

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been even brought before the Court, except, perhaps, so far as it may have been discussed in an unreported case of *Wright v. Lord Dorchester*. But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to *choses in action*, bonds, &c.: in *Ryall v. Rowles* (a) it is expressly applied to bonds, simple contract-debts, and other *choses in action*. It is true that *Ryall v. Rowles* was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Chief Justice *Lee*, Lord Chief Baron *Parker*, and Mr. Justice *Barnett*; so that the principle, on which the Court there acted, must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice *Burnett*, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron *Parker* says, that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds, that, with respect to simple contract-debts, for which no securities are holden, such as book-debts for instance, notice of the assignment should be given to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. (b) In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund: it is going as far towards equitable


(a) 1 *Ves.* sen. 348. 1 *Alk.* 165. (b) 1 *Ves.* sen. 367. 2 *Alk.* 177.

able possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

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I have alluded to a case of *Wright v. Lord Dorchester*, which was cited as an authority in support of the opinion of the Master of the Rolls. In that case, a person of the name of *Charles Sturt*, was entitled to the dividends of certain stock, which stood in the names of Lord *Dorchester* and another trustee. In 1793, *Sturt* applied to Messrs. *Wright* and Co., bankers at *Norwich*, for an advance of money, and, in consideration of the monies which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. *Wright* and Co. to the trustees. It would appear that *Sturt* afterwards applied to one of the defendants, *Brown*, to purchase his life-interest in the stock; *Brown* then made inquiry of the trustees, and they stated that they had no notice of any incumbrance on the fund: upon this *B.* completed the purchase, and received the dividends for upwards of six years. Messrs. *Wright* then filed a bill, and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of *Brown*, disclosing the facts with respect to his purchase, Lord *Eldon* dissolved that injunction. At the same time, however, that he dissolved the injunction, he dissolved it only on condition that *Brown* should give security to refund the money, if, at the hearing, the Court should give judgment in favour of any of the other parties. That case was attended also with this particular circumstance, that the party, who pledged the fund, stated by his answer, that, when he executed the security to *Wright* and Co., he considered that the pledge was meant to

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to extend only to certain real estates. For these reasons, I do not rely on the case of *Wright v. Lord Dorchester* as an authority; I rest on the general principle to which I have referred; and, on that principle, I am of opinion that the Plaintiffs are not entitled to come into a court of equity for relief against the Defendant *Hall*. The decree must, therefore, be affirmed, and the deposit paid to *Hall*.

The case of *Loveridge v. Cooper*, though the circumstances are somewhat different, is the same in principle with *Dearle v. Hall*, and must follow the same decision.

COOPER v. FYNMORE.*

BY an indenture, bearing date the 18th of *May* 1804, and made and executed by and between *Amelia Hartley* of the first part, *Charles Reimer* of the second part, and *William Fynmore* and *William Fisher* of the third part; after reciting, that a marriage was intended to be had between *Amelia Hartley* and *Charles Reimer*, it was witnessed, that *Fynmore* and *Fisher* were to stand possessed of a sum of 800*l.* 3 per cent. consols, which had been transferred into their names, upon trust, to pay the interest and dividends, as they should become due, “into the proper hands of *Amelia Hartley*, during the joint lives

* After judgment had been given at the Rolls in *Dearle v. Hall*, and *Loveridge v. Cooper*, a short note of the decision in this case was communicated by Mr. *Cooke* to Mr. *Shadwell*, and by the latter to the reporter. The facts are taken from the Registrar’s Book. No reference was made to it, on either side, in arguing the two appeals.

lives of her and *Charles Reimer*, her intended husband," for her separate use, and, after the decease of either of them, upon trust, to transfer the stock to the survivor of them, *Amelia Hartley* and *Charles Reimer*, his or her executors, administrators, and assigns.

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In and before the month of *June* 1805, *Reimer* was indebted to *Joseph Cooper* in the sum of 180*l.* 8*s.*, and, in the beginning of that month, *Cooper* lent to *Reimer* a further sum of 99*l.* 12*s.*

By an indenture, bearing date the 8th of *June* 1805, made and executed by and between *Charles Reimer* and *Amelia* his wife, of the one part, and *Joseph Cooper* of the other part, the 800*l.* 3 per cent. consols, standing in the name of *Fynmore* and *Fisher*, were granted, bargained, sold, assigned, and transferred unto *Cooper*, his executors, administrators, and assigns, as a security for the payment of the sum of 300*l.* and interest, on the 8th of *June* 1806.

By an indenture bearing date the 30th of *October* 1807, made and executed by and between *Charles Reimer* and *Amelia* his wife, of the one part, and *Robert Ingram* of the other part, reciting the deed of the 18th of *May* 1804, and that *Reimer* and his wife had contracted with *Ingram* to grant to him an annuity of 31*l.* 14*s.* for the lives of *Reimer* and his wife, and the survivor of them, at the price of 150*l.*, it was witnessed, that *Reimer*, and *Amelia* his wife, did give, grant, bargain, sell, &c. unto *Ingram*, his executors, administrators, and assigns, during the life of *Reimer* and his wife, and the life of the survivor of them, an annuity of 31*l.* 14*s.*, to be charged and chargeable upon, and to be issuing and payable out of a certain sum of 2000*l.*, and also out of the interest, dividends, income, and produce, whether annual

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annual or otherwise, of the said sum of 800*l.* 3 per cent. consolidated bank annuities: and for the better securing the said annuity, *Charles Reimer*, and *Amelia* his wife, did thereby bargain, sell, assign, transfer, &c. unto *Ingram*, his executors, administrators, and assigns, (among other things) all that sum of 800*l.*, &c., to hold the same unto him, his executors, administrators, and assigns. The deed contained also a power of attorney from *Reimer* and his wife to *Ingram*, his executors, administrators, and assigns, to receive the dividends of the stock upon the trusts therein mentioned.

The whole of the principal-money secured by the deed of *June* 1805, and interest from the date of it, being due, *Cooper* filed his bill against *Fynmore* and *Fisher*, *Reimer* and wife, and the personal representatives of *Ingram*, praying that the stock might be assigned to him upon the trusts expressed in the deed of *June* 1805, or that a competent part of it might be sold, and the proceeds applied in payment of his demand.


By a decree, made by the Master of the Rolls on the 16th of *February* 1813, it was referred to Master *Campbell*, to take an account of what was due to the plaintiff and to the defendants *Ann Ingram*, *John Greenhill*, and *Joseph Hadley* (the executrix and executors of *Robert Ingram*), upon their respective securities; and the Master was to state the priorities of the plaintiff and those defendants in the 800*l.* 3 per cent. bank stock.

The executors of *Ingram* in their state of facts, after setting forth the deed under which they claimed, charged, that, a short time previous to the execution of the indenture of the 30th of *October* 1807, *Robert Ingram*, by his solicitor, *John Haynes*, applied to *Fynmore* and
Fisher,

Fisher, as trustees under the marriage-settlement of *Mrs. Reimer*, to know whether the 800*l.* 3 per cent. consolidated bank annuities was charged or incumbered; that, in answer thereto, the trustees informed *Haynes*, that they did not know of any charge or incumbrance upon or affecting the property; that thereupon *Ingram* paid the purchase-money; and that, in *August* 1808, *Ingram* caused a notice, in writing, of the indenture of the 30th of *October* 1807, to be given to *Fynmore* and *Fisher*, which notice, after certain recitals, proceeded in the following words — “ Now I, *Robert Ingram*, do hereby give you notice of the indenture of the 30th day of *October* 1807, and of the annuity granted to me as aforesaid, and of such assignment of the said sum of 800*l.* 3 per cent. consolidated bank annuities, and also of the said assignment of 2000*l.*, and the stocks, funds, and securities in which the same sums respectively were or should be invested, and all the dividends, interest, income, and produce of the same sums respectively, for securing the payment of the said annuity, &c.; and also that the said annuity is in arrear and unpaid upwards of twenty-one days, and therefore I require you to pay me the same out of the assigned premises.” They, therefore, charged, that, *Cooper* not having given to *Fynmore* and *Fisher* any notice of the indenture of the 8th of *June* 1805, or of the incumbrance thereby created, the stock standing in the name of the trustees ought to be applied, in the first place, in the payment of the arrears of *Ingram’s* annuity, which had been unpaid for six and a half years previous to the 30th of *April* 1814.

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The state of facts of the Plaintiff *Cooper*, besides setting forth his deed, which was there represented to have been executed in order to secure the repayment of a sum of 280*l.* due from *Reimer* to *Cooper*, merely charged, that he, *Cooper*, had received no part either of the principal

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cipal or of the interest secured by the deed of *June* 1805, and that that deed, and the charge thereby created, had priority over the deed of the 30th of *October* 1807. There were no allegations contradicting the priority of notice on which *Ingram's* representatives relied.

'The Master found that the Plaintiff's security was the prior incumbrance on the 800*l.* stock. To that finding the representatives of *Ingram* took an exception.

On the 16th of *December* 1814, the cause came on to be heard, on exceptions and further directions, before the Vice-Chancellor.

Sir *Thomas Plumer*, VICE-CHANCELLOR, held, that the Master's report was right, and that the Plaintiff had the prior incumbrance. Mere neglect of notice, he said, was not sufficient to postpone him. In order to deprive him of his priority, it was necessary that there should be such laches as, in a court of equity, amounted to fraud. *Jones v. Gibbons.* (a) Upon principle and upon authority, the Plaintiff was entitled to priority.

The Court overruled the exceptions; and, by the decree, it was ordered, that the stock should be sold; that, out of the proceeds of the sale, there should be paid the costs of the trustees and of the Plaintiffs, and then the amount due to *Cooper*; and that the residue of the money should be applied, so far as it might extend, in paying to the representatives of *Ingram* what should be found due to them on their security and for costs.

Reg. Lib. 1814. A. 1410.

(a) 9 *Ves.* 407.

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HONNER v. MORTON. *

1826.

November 27.

1828.

April 15.

ANTHONY Calvert, by his will, dated in *November* 1808, bequeathed the residue of his estate to trustees, upon trust to invest a certain share of it in the public funds or on real securities, and to pay one half of the interest or dividends to *Eleanor Torrie* for her life, and the other half to *Susannah Brewer* during her life; and he directed that, after the death of the tenants for life respectively, the trustees should transfer the principal monies and funds, in equal shares, to the two daughters of *Eleanor Torrie*, then living. The testator died in the following *December*; and a sum of 14,395*l.* 3 per cent. consolidated bank annuities was placed in the name of the trustees, as that part of his residue in which *Eleanor Torrie* and *Susannah Brewer* were interested.

Eleanor Torrie, the tenant for life of one moiety of the fund, had two daughters at the date of the will. She died on the 1st of *April* 1824. *Mrs. Brewer*, the tenant for life of the other moiety of the fund, was still living.

Where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration.

The

If the wife, after her husband's death, executes an assignment of the fund, which recites former assignments by the husband, and purports to be made subject to them, she does not thereby recognise or confirm those former assignments.

The wife does not acquiesce in those assignments, or waive her right to claim against them, by forbearing to impeach them till the death of the tenant for life.

* This case, and several of those which follow, were argued at the Rolls before Sir *J. S. Copley*: some of them were decided by him at the Rolls; in others, judgment was given, after he was Lord Chancellor.

This case had been previously argued before Lord *Gifford*; and stood for judgment at the time of his death.

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The Plaintiff, one of the two daughters of *Elcanor Torric*, was, at the date of the will, and at the death of the testator, the wife of *John Honner*; and he died in *January* 1817, before his wife's reversionary interest fell into possession.

During the coverture, Mr. and Mrs. *Honner* executed indentures, dated in *March* 1814, *November* 1814, *January* 1816, and *November* 1816, by which they assigned, for valuable consideration, to different purchasers, various portions of the trust-fund to which Mrs. *Honner* would be entitled on the death of her mother and Mrs. *Brewer*.


The assignment of *November* 1816 was made to one *Streater*. Mrs. *Honner*, after the death of her husband, agreed to sell to *Streater* a further portion of the fund; and this agreement was carried into effect by an indenture, dated in *November* 1817, which was indorsed on the assignment of *November* 1816. This indorsed deed was made between Mrs. *Honner*, of the one part, and *Streater* of the other part; it recited, that *Streater* was entitled, under the within-written indenture, to a certain portion of the fund, and referred to the other assignments; and it purported to transfer the property to *Streater*, subject to these assignments.

On the 4th of *May* 1824 (a), Mrs. *Honner* filed her bill, insisting that the assignments, made while her husband and the tenant for life were both alive, did not bind her, and praying that her portion of the fund might be transferred to her.

The principal question was the same as arose in *Purdew v. Jackson*, namely, Whether, when a husband and wife

(a) After the decision in *Purdew v. Jackson*.

wife have assigned to a purchaser, for valuable consideration, an ascertained fund, in which the wife has a vested reversionary interest, expectant on the death of a tenant for life, and the wife and the tenant for life both outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of the fund against such particular assignee for valuable consideration?

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No authorities and doctrines were referred to by the counsel on either side, which were not mentioned in the argument of *Purdew v. Jackson*, except *Lee v. Muggeridge*. (a)

The assignees of the fund contended, that, even if the principal question should be decided against them, the wife was bound by acquiescence, having suffered more than seven years to elapse, after the death of her husband, without questioning the validity of the instrument: and they further insisted, that the deed of *November 1817*, executed by the Plaintiff when she was a *femme sole*, would operate as a confirmation of the prior assignments, to which it purported to be subject, or, at least of the assignment of *November 1816*.

To this it was answered, that it was not incumbent on the Plaintiff to assert her right, till the fund fell into possession. As to the deed of *November 1817*, it could not give validity to instruments which were not previously binding on her; because there was no intention in any of the parties, that it should operate as a confirmation. A purpose of confirmation would have been manifested by express words of confirmation. The assignments of 1814 and 1816 were at that time believed to be valid; and, on this notion, it was very natural that

(a) 5 *Taunt.* 36.

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that they should be mentioned in the assignment which the wife executed after her husband's death. It could not give any validity even to the prior deed of *Streater* himself; still less could it operate as a confirmation of the deeds of persons who were not parties to it.

Mr. *Shadwell*, for the Plaintiff.

Mr. *Horne* and Mr. *Coombe*, for *Streater*.

Mr. *Sugden* and Mr. *Girdleston jun.*, for some of the assignees of the fund.

Mr. *Lovat* and Mr. *Garratt*, for others of the assignees.

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The LORD CHANCELLOR.

This fund was a chose in action of the wife; it was her reversionary chose in action. Whether the husband has the power of assigning his wife's reversionary interest in a chose in action, is a question which has been repeatedly agitated, and has excited considerable interest, both at law and in equity. At law, the choses in action of the wife belong to the husband, if he reduces them into possession; if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the chose in action of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor; and that he, too, must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement, that he will reduce the property into possession; it likewise considers what a party agrees to do

do as actually done: and, therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On the other hand, I should also infer, that, where the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property, till, by subsequent events, he comes into the situation of being able to reduce the property into possession; and then his previous assignment will operate on his actual situation, and the property will be transferred.

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Such are the views which would occur to the mind, if there were no cases or authorities on the subject. But the question has frequently been under the consideration of courts; and it is material to consider what the authorities are, both on the one side and on the other.

Sir *William Grant*, in *Mitford v. Mitford*, referring to an opinion which had been entertained in the profession, that the husband's assignment, for valuable consideration, of the wife's chose in action, passed an absolute right to the property, freed from the wife's contingent right by survivorship, seems to have intimated a strong doubt of its soundness. "If such be the rule," says he (a), "it is the favour a court of equity shews to such a purchaser that operates, as in many cases it does, to put him in a better situation than the party from whom he derives his title." In *White v. St. Barbe*, he has said, in distinct terms (b), that "A husband can dispose of such property of his wife in expectancy against every one but the wife surviving;" thereby intimating his opinion, that, against the wife surviving, the husband's assignment would not operate.

Thus

(a) 9 Ves. 99.

(b) 1 Ves. & Beames, 405.

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Thus stood the question, when *Hornsby v. Lee* (a) came before the Court. In that case the question was argued on both sides; and Sir *Thomas Plumer* decided, that the husband's assignment of the wife's reversionary interest was not valid against her surviving. It is true, that it was a contingent interest which was there assigned; but the decision did not at all turn on that particular circumstance.

The case of *Hornsby v. Lee* excited considerable inquiry in the profession; and it was discussed very much at length in Mr. *Roper's* book on the *Law of Husband and Wife*. After the attention of the Court had been directed to that decision, the question came again before the same judge in *Purdew v. Jackson*. (b) The point was clearly and distinctly raised. It was argued with great learning and ability on both sides, and particularly on the side adverse to the opinion of the Master of the Rolls. After the first argument, the importance of the question, and the doubts which had been entertained with respect to it, induced the Court to direct a second argument. It was argued again by one counsel on each side, and the Master of the Rolls took time to consider of his judgment. At length he delivered a most elaborate judgment; and, after going through every part of the question, came to a conclusion consistent with his opinion in *Hornsby v. Lee* — that the husband could not assign the reversionary interest of his wife in a personal chattel, so as to bind her, if she survived him.

Thus stand the cases in point, and the direct authorities on the one side. These decisions are consistent with the principle to which I have adverted. They support that principle, and are founded on it; and I should feel myself bound by those authorities, supporting

(a) 2 *Mad.* 16.(b) 1 *Russell*, 1.

porting a principle in which I concur, unless I found them overborne by a superior weight of authorities on the other side.

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It is not my intention to go through all the authorities that have been referred to as contradicting the conclusion to which Sir *Thomas Plumer* came: I shall satisfy myself with adverting to two or three of them, which have been most relied on.

Dawbury v. Atkins (a) was cited at first with much confidence, but appears ultimately to have been given up. The decree in that cause was, in one respect, clearly erroneous; and the Court seems to have considered the legacy, though charged on a reversion, as a present gift; for interest was allowed on it from the death of the testator.

In *Grey v. Kentish* (b) the decision was in favour of the wife; and, therefore, so far as relates to the decree, that case is not an authority against the wife's right by survivorship. But it is cited on account of a *dictum* which occurs in the report of the judgment. There Lord *Hardwicke* is represented as stating distinctly and in terms, "A husband cannot assign in law a possibility of the wife nor a possibility of his own; but this Court will, notwithstanding, support such an assignment for a valuable consideration." In the first place, this is a mere *dictum*, and was not essential to the decision of the case. It is also to be observed, that the case is most inaccurately reported. As stated in *Atkins* it is unintelligible; and it is only by attending to the correction of it, in a note by Mr. *Cox*, that we are able to ascertain what

(a) *Gilb. Eq. Rep.* 88.

(b) 1 *Atk.* 280.

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what the true facts were. I mention this circumstance for the purpose of shewing, that, in *Grey v. Kentish*, not much reliance can be placed on the accuracy of the reporter.

In *Bates v. Dandy* (a) the decision was against the wife; but then no doubt could be entertained as to the husband's

(a) 2 *Atk.* 208. 1 *Russell*, 33.

The following note of Lord *Hardwicke's* judgment in *Bates v. Dandy*, which is much more full than the report in *Atkins*, is taken from the late Lord *Colchester's* MSS. in the possession of Mr. *Abbot*.

BATES v. DANDY.

1741.
July 1.

Lord **HARDWICKE**, Chancellor.

John Dyer, having two mortgages, the one in fee, the other for a term of years, makes his will; and, after giving some legacies out of his personal estate, devises the surplus of such estate to be divided among three persons, one of whom is the defendant, his sister, and then wife to *Dandy*, now deceased. After this, and during the life of *Dandy*, the defendant's husband and *William Dyer*, brother and executor of the testator, make up an account, at the bottom of which were these words; viz. "All parties allow this account, and agree that the clear surplus of this estate amounts to . . . ; and the respective

proportions thereof are carried to our several credits to our several accounts." And, after stating the clear surplus of the personal estate, then there is an actual division of it.

After this, another account is subscribed and signed, containing a particular account of the proportion of *Dandy* and his wife, the defendant, and then there are these words:—"We, having examined the above account, and approved thereof, do agree, the mortgages therein charged (which are the two mortgages in question) be allotted to the share of *Dandy* and his wife, and remain to them." So that here is an actual separation of these mortgages from the estate, and

husband's power over the property, which was the subject of assignment there: and the application of that case, also, to the present question, rests, not on the decree, but on

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and an appropriation of them as the share of the defendant, the wife. And, upon the same day, a note is signed by *Dyer*, the executor, viz. "I promise, upon the request of my brother *Dandy*, (the husband of the defendant, his sister), to execute an assignment of the two mortgages belonging to my late brother, *John Dyer*, made by to him, and all interest therein to my said brother *Dandy*, as he shall appoint." This shews, that, by these two mortgages being approved of as the defendant's share, and by there being this actual division of them from the rest of the estate, they remained no longer as part of the general surplus of the estate of the testator.

Afterwards, an assignment was entered into between the defendant's husband and the plaintiff's father *Edward Bates*, dated 14th October 1788, which was upon the following transaction. *Edward Bates* lent 200*l.* to *Dandy*; upon which there was this agreement by *Dandy*, viz. "I promise to pay to *Edward Bates* 200*l.* upon de-

mand, for value received, with lawful interest for the same; and for securing the said money, with lawful interest for the same, I have deposited in the hands of the said *Edward Bates* four mortgages, and securities for some houses and lands, &c. at G., belonging to me; and which I promise to convey and make over to *Edward Bates* for the purpose aforesaid."

Dandy dies, and now a bill is brought by the plaintiff, as administrator of his father, *Edward Bates*, (who lent this 200*l.* to *Dandy*), upon the faith and security of these two mortgages now in question, (which were the share of his wife), for an assignment of them; and that they may stand as securities for the plaintiff's 200*l.* and interest. *Dandy*, upon lending this money, undertook to assign these mortgages; and this, in respect of himself or those claiming under him, for a valuable consideration, must be considered as amounting to an actual assignment in equity.

The parties, with whom the plaintiff

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on a *dictum* wholly unnecessary for the decision of the actual points which were before the Court. “The husband” (so says the report) “may assign the wife’s chose in

plaintiff is to contend, are the defendants, the widow of *Dandy*, and the other defendant, the administrator of *Dandy*, who stands in his place; and there is a difference in respect of the right of these defendants. And I shall consider it in respect of the wife of *Dandy*. Whether the plaintiff is entitled to an assignment of these two mortgages, and to have them stand as a security for the 200*l.* and interest, depends upon the consideration of the nature of the interest that *Dandy* and his wife had in these securities, and upon the effect and consequences of the acts done by the husband.

As to the nature of the interest which the husband had in these securities — undoubtedly, at law, the mortgage term was vested in *William Dyer*, the administrator of *John Dyer*, and remained so to the time of the death of *Dandy*; and as to the mortgage in fee, the legal estate was vested in *William Dyer*, the heir at law of *John Dyer*: but that was but an interest in the

personal estate, and here he has promised to assign the mortgage in such manner as should be thought reasonable.

What then is the interest that *Dandy* and his wife had in the view of this Court? The wife was one of the residuary legatees, and, therefore, entitled to the interest of both the securities, after the division of the estate — to the trust both of the mortgage term, and the mortgage in fee, though the legal estate was in *Dyer*. The interest which *Dandy* had was in right of his wife, and these securities to some purposes are to be considered as choses in action; because, as to the mortgage term, though the trust of it was in the wife, in the consideration of this Court, it was but as a security for money lent: and if the husband had died without disposing of it, it would survive to the wife. And if the contest here was only as between the wife and the administrators of her husband, equity would follow the law therein. As, at law, choses in action belonging to the

in action, or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration; but though he cannot dispose of

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the wife, after the husband's death, shall survive to her, and as a term for years in the wife, after the death of her husband, will survive to her, so will the trust of it; and there can be no difference between the absolute interest in a term, and the trust of a term, unless any intervening act of the husband should happen. The husband might have recovered and received the money upon both the mortgages, and released it, and thereby discharged the estate in his lifetime, unless there had been a judgment or decree; and if there had been a decree, and the husband had not disposed of the benefit of it, it would survive to the wife. And, in order to recover upon the wife's choses in action, &c. (if this is compared with the strict rules of law), I do not know, whether there would be a necessity to make the wife a co-plaintiff, unless where there is no provision for her; for if the husband bring an action on the bond of his wife, made to her before marriage, the wife must join for conformity, and the

judgment shall be, that husband and wife recover; yet, if a bond is given to a wife after coverture, he alone may maintain an action, and have judgment that he shall recover himself, and there is no occasion to join the wife for conformity. So it is determined in 3 *Lev.*: and this difference the law makes between choses in action before and after coverture, for in the latter case they come absolutely to him as being vested. In the present case the money is not received, nor is there any decree: therefore, as to the legal and equitable interest, in this Court that must be laid out of the case; and this brings it to the next question, viz.

What acts the husband has done towards reducing these two mortgages into possession, or towards a disposition of them, and what will be the effect and consequence of his acts?

As to the act that has been mentioned, that was a promise and agreement by the husband to assign these two mortgages to the plaintiff's father, in consideration of

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of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money." Here is the opinion of a very learned

of 200*l.* lent, which was a valuable consideration.

It has been insisted by the defendant, that no actual assignment has been made; but that will not make any difference, neither in respect to the administrator of the husband, nor the surviving wife; for if the husband had a right and power, in the consideration of this Court, to have assigned the interest, which belonged to the wife, and if he has, for a valuable consideration, undertaken to assign it, that will amount to the same thing, in this Court, as if he had so done. That comes to the case of Lord and Lady Coventry (a), relating to the execution of a power, where a person claimed in remainder, subject to an execution of a power in tenant for life, and tenant for life covenanted, in consideration of a marriage, to execute his power as a jointure; and the Court held, that was to be considered in equity as done, and decreed accordingly, though the remainder man was not to be bound, unless

some act was done that amounted to an execution of the power; but if this had been a covenant after marriage, and the wife had been a volunteer, the remainder man would not have been bound. In that case the tenant for life had not near so much power as the husband had in the present; therefore, this is to be considered as an assignment by the husband. And if so, then it comes to this question, whether he had any power to assign the two mortgages, or either of them, or the trust or beneficial interest of them, which belonged to his wife? and I am of opinion he had in respect of creditors.

It is true, that it was anciently thought, in this Court, that, where a *feme covert* was entitled to the trust of a term for a great number of years, the husband could not assign or dispose of it to the prejudice of the wife; but she was entitled as survivor if he died before her.

But the contrary was settled in *Turner's* case (b), which

(a) 1 *Eq. Cas. Abr.* 348. 2 *P. Wms.* 223.

(b) 1 *Vern.* 7.

learned Judge, not essential to the decision of the particular case, conformable to an opinion said to have been expressed by him in another case, where also it was not essential to the decision.

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But

which case has been taken to be law, and has been the rule of the Court ever since, and many authorities have been founded upon it; for there it was held, that the husband may assign or dispose of a trust term belonging to his wife; nay, the Court has gone so far, that, where a term was limited to trustees, by a former husband, for the separate use of the wife, and the second husband afterwards assigned that term, it was held, that the wife should be bound, though the original trust was for her separate use, limited to her by her first husband.

If a husband settle a term in trust for his wife, he shall not afterwards dispose of that term, because that would be contrary to his own act, and the intention of the parties.

A distinction has been made at the bar between the case of a mortgage term, and the absolute interest of a term, which is what I never heard before, in respect to the husband's power of disposing of it. There can be no doubt at law, but that, if

the wife has a mortgage term, the husband may dispose of it as an absolute term, because the legal interest is in the wife. And if the husband disposes of the equitable interest of a term, this Court will follow the law, and suffer him to do it, as the law does in respect to the absolute interest. So the same holds in the case of a mortgage term, and an absolute term.

As to the mortgage in fee, that, indeed, does differ from the mortgage term; and it is insisted that the wife had no estate in the land, for that it was in the trustee, and was an estate in fee, and the heir-at-law is a trustee of the fee for the wife, and a husband cannot dispose of an estate in fee which comes to his wife.

This is true, where it is the case of an absolute estate; but where it is a mortgage in fee, that is considered in equity only as a security for the money advanced, in respect of the covenant, and is a chose in action upon the foot of such covenant, and the debt is considered as such,

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But in considering what weight these *dicta* are entitled to, it is material to consider, whether the same Judge has ever expressed an opinion tending a contrary way.

such, and the husband cannot assign a chose in action of the wife; and this hath been contended in respect to both mortgages: which, therefore, brings it to this question, — Whether a husband can assign a chose in action of his wife, so as to bind her?

I do agree that he cannot voluntarily do it without any consideration, though he may assign a term, or the trust upon it, upon the authorities before mentioned, in that manner; but I am of opinion, that, for a valuable consideration, he may assign; and I have always taken that to be the distinction.

Suppose a bond given to a wife when sole, the husband might receive the money, and discharge or release it, without any consideration, and such release would be good. If so, then the debt would be gone, both at law and equity, and the wife cannot afterwards recover it. Then what reason can be assigned, why the husband, receiving in the money, or releasing the security, may not assign over

the interest of it for a valuable consideration? In the case of Lord *Carteret v. Paschall* (a) this point was debated, when the Court gave its opinion. It was not denied but that the husband might make such assignment, and it was compared to a tenancy by *elegit*, which is a chattel interest, and at law was assignable; and some authorities were cited to shew, that, for a valuable consideration, a husband might assign mere choses in action of the wife's; and in that case the matter was in fact but a chose in action, it being only a decree made before the wife's marriage, that she should hold and enjoy, and that till she was satisfied not only the arrears of her annuity, but likewise several debts due upon mortgages; for the wife had an old mortgage upon the estate. And what was her right upon the case? It was no more than a chose in action, for a mortgage is no more; and no doubt the husband was entitled to come into this Court, and pray to discharge

(a) 5 P. Wms. 197.

way. In *Bush v. Dalway* (a) if the husband had died in the father's lifetime, the same question might have arisen as exists here. The actual state of circumstances in *Bush*

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(a) 1 Ves. sen. 19. 3 Atk. 530.

discharge it. Afterwards, in that case, the husband makes an assignment of his wife's interest to the trustees, with the intent to reduce it into possession, and make himself master of it, and, after that, he makes a derivative security; and upon that it was decreed, that the creditor of the husband, who had taken this security, was entitled, and that the representatives of the husband should have any surplus, over and above what satisfied the creditors, against the representatives of the wife, which I own was carrying the doctrine farther than before.

In the case of *Theobald v. Duffoy* (a), the wife was entitled to a possibility in a trust term. The trust was declared to A. for life, then to the wife for life, which in law is but a mere possibility; because the law considers an estate for a man's life better than for years, upon a supposition that an estate for life will last longer than any estate for years, however so many years are limited. And this arose

from the considering the nature of estates for years, as they were formerly, when leases used to be made for short terms, and when the tenant of the freehold used to destroy them at pleasure, before the statute 21 H. 8., by suffering a recovery: so that, the tenant for life being the owner of the freehold, the law considered him as having a greater estate; and this term, being but a possibility in respect of its lasting longer than the estate for life (depending upon it), could not be conveyed; but, notwithstanding this, the husband and wife, and the trustees, joined in an assignment of the possibility to a stranger, for a valuable consideration; the husband dying, the wife insisted she had no power to make such assignment; but yet Lord *Macclesfield* said, that the assignment should bind her, because the wife's friends had joined with her in it; and he decreed in favour of it, relying upon that circumstance, though I never

(a) 9 Mod. 102.

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Bush v. Dalway was, that the father died first, and then the husband; the husband, upon the death of the father, had a right to the money which was in question: and it

never thought it of much weight. And he held, that, though a wife could not assign a chose in action at law, yet, for a valuable consideration in equity, she might do it; and that it was the same as if she had received the money upon such chose in action, which she might do.

And, therefore, I think the assignment in the present case is a good one with respect to creditors.

The case in 2 *Vern.* 401. (a) is cited to combat with this distinction, but there the articles were voluntary, and I think there was no assignment; but that will not make any difference. The Court there dismissed the bill, because the husband had not absolutely a power over the mortgage, and he did not reduce it into possession; and not having so done, it survived to the wife. The articles there were plainly voluntary. And though the Court does not expressly take notice of their being so, yet there is something which imports it, for the assignee

in that case stood but in the place of the husband, and there was no agreement between them: and a bare assignee, without a valuable consideration, or an administrator, can stand in no better condition than the husband himself; but, where there is a valuable consideration, the assignee does.

As to the case in 1 *Vern.* 58. (b), that does not come up to the present: nor that of *Colehand v. Colehand* (c). As to that of *Packer v. Wyndham*, I much question whether that case is stated right in the report (d), for it depends upon a great many things. The wife there was under the care of the Court, as being a lunatic; and she was a lunatic at the time when the husband assigned her interest. And as that case consisted of so many different circumstances, and depended on so many reasons, I think it was not to be made a precedent in any other.

Another objection in this case was, that the husband might not have made any provision

(a) *Burnet v. Kinaston.*

(b) This reference seems to be erroneous.

(c) Probably *Cleland v. Cleland*, *Prec. in Chanc.* 63.

(d) *Prec. in Chanc.* 412.

It was upon the ground of the death of the father in the husband's lifetime, that the wife was considered as bound by the covenant of the husband to assign the fund.

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provision for the wife, but there is no proof as to that; and though that is an equity which the wife has against the husband, yet, where there are creditors of the husband, or, more strongly, where there are purchasers for valuable consideration, I do not know where that equity has ever prevailed: and that was insisted on in the case before mentioned, but the Court would not allow it.

The next question is between the wife and the administrator and general creditors of her husband; and, as to them, the case is quite different, for they claim merely as standing in his place; and though they are creditors, they will not stand in a better condition than an administrator, and though themselves are administrators, it will be the same. And, therefore, as to the residue over and above what will satisfy the mortgage, the wife will be entitled to it; for, though the husband might have disposed of the whole, in his lifetime, for a valuable consideration, yet as he did not, and as the validity of the

assignment depends upon the consideration in a court of equity, and as the Plaintiff's father has lent only 200*l.*, which is less than the value of the mortgages, &c., of the wife deposited in his hands, and agreed to be assigned by the husband, and considering that the question is between the wife and those who stand in the place of the husband, as administrators, who are in no better condition than him, I think the wife is entitled to the residue of the value of such mortgages, &c.; especially as it was intended that the alienation of them by the husband should go no further than as specified in the agreement, for he has deposited these mortgages, &c. in the hands of *Edward Bates*, which was agreed to be for the purposes aforesaid; and I shall not carry it any further.

Therefore, upon the whole, I am of opinion, as to the surplus, the wife is entitled: and, in consequence thereof, let the master take an account of what is due to the Plaintiffs, for the 200*l.* lent by *Edward Bates* to the Defendant

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fund. Lord *Hardwicke* says, "Perhaps the event might have happened in which she would not be bound; ~~as if~~ the right of action never had vested in the husband: but here it did by his surviving the father. A question was made, — whether the husband had a right to assign it in his father's life, — which is not necessary here; although I think he might not. . . . Here," continues he, "before the father's death, he had no right of action at all; but, afterwards, he might have called for it immediately, which the wife could not have otherwise prevented than by a bill for performance of the covenant." (a) The learned Judge here says, (though not in very strong language) that an event might have happened in which the wife would not have been bound by the husband's covenant to assign her possibility, namely, if he had died before the father, and that the husband could not assign the possibility during her father's life. The point, indeed, was not necessary for the decision of that particular case; still the opinion expressed by Lord *Hardwicke* on that occasion is at variance with the other *dicta* I have referred to: and when we are considering to what degree of respect the language, so attributed

(a) 1 *Ves. sen.* 20.

fendant *Dandy's* husband, with interest for the same, and costs; and, after payment of what shall be so found due for principal, interest, and costs from the Defendant *Sarah Dandy* to the Plaintiff, let the Plaintiff and *William Dyer*, the heir of *John* and executor of *Alexander*, join in an assignment to her of the two mortgages; but, in default

of such payment by *Sarah Dandy*, then she is to stand foreclosed; and in that case let Defendant *Sarah* join in an assignment of the two mortgages to the Plaintiff, &c.

Cases cited at the bar —
Ca. in Eq. Abr. 58. 1 *Vern.* 7.
 396. 2 *Vern.* 270. 68. 401.
Prec. in Chan. 118. 418.

attributed to that learned Judge, is entitled, we are justified in setting the one *dictum* against the other. The proposition cited from *Grey v. Kentish* and *Bates v. Dandy* might have been intended to be qualified in a variety of modes. What is the ground on which, in *Bush v. Dalway*, he puts the power of the husband to assign the chose in action of the wife? On the power of the husband to reduce the chose in action into possession. If he had not had the power to reduce it into possession, his assignment or covenant to assign would not have operated; until the power of reducing the fund into possession vested in him by the death of the father, his covenant did not operate against the wife.

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The same case is reported in *Atkins*; but the opinion is not expressed in terms quite so strong. According to that report, Lord *Hardwicke* expresses himself thus: "I cannot say but there might have been an event which would have given it to the wife, viz. if her husband had died in the lifetime of the father. But the death of the father happening in the lifetime of the Defendant's husband alters the case. I am not obliged to give any opinion, as the husband has not assigned this contingency of the wife's; but I am rather inclined to think the husband would not have had a right to assign it. . . . It has been frequently determined," he adds, "that a husband may assign a wife's chose in action for valuable consideration. But what does that turn upon? Why, the husband's right to sell. The husband here survived the father, so that he had a right to call upon the representatives of the father, or the trustees, to raise it." (a) In this passage, I apprehend, the word *sell* is a misprint for *sue*; and, to make the report of the judgment consistent with that in *Vesey*, we must read, "the husband's right to sue," instead of "the husband's right to sell."

(a) 3 *Atk.* 533.

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From the judgment of Lord *Hardwicke*, in *Ives v. Medcalf**, an opinion may be inferred similar to that which he expressed in *Bush v. Dalway*.


Hawkins v. Obyn (a) has been referred to as an authority in support of the husband's assignment ; and, undoubtedly, Lord *Hardwicke* is represented as having there expressed himself in terms corresponding to what he is stated to have said in *Grey v. Kentish* and *Bates v. Dandy*. In that case the testatrix bequeathed 2000*l.* to her son and daughter (who were husband and wife), to be enjoyed by them or the survivor of them. The wife might have been the survivor, and her interest was a possibility. Alluding to this interest, Lord *Hardwicke* says (b), "It has been insisted, too, in order to make this fall within the proviso, that the husband's disposition in his lifetime would have bound the wife, notwithstanding she had survived him ; and if not good in law, yet it would have been in equity. I will not say but the husband

(a) 2 *Atk.* 549.(b) 2 *Atk.* 551.

* 1 *Atk.* 63. In that case, by articles made before marriage, the husband and wife (who was an infant, and a daughter of a freeman of *London*,) covenanted, in consideration of her portion, to release all the right and interest in the personal estate of her father, which might accrue to them by the custom of the city. The husband and wife survived the father ; and one of the questions was, whether the covenant to release bound the wife's orphanage share ? Lord *Hardwicke*, in his judgment, says, "As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight,

for there is no doubt that it might be released in equity ; but here it is a covenant which the defendant is bound by in all events, and it is no objection to say, the wife was under age ; for though, in this respect, if the husband were dead, the articles would not bind her, and she would, by survivorship, be entitled to the customary share, as a *chose in action*, not recovered or received by the husband ; yet, he being alive, it is a matter that accrues to him in right of his wife, and he may release it, and his release will bind her ; and, therefore, it was reasonable he should perform his covenant."

band might have disposed of this property in equity, if assigned for a valuable consideration; but, then, that must have been upon an actual assignment of this particular thing." That position, in reference to the particular circumstances of the case, cannot be sustained consistently with any of the authorities: for the event, in which the wife would have become entitled, never could have happened during the lifetime of the husband; and it is clear, from all the authorities, that, if the possibility cannot happen during the coverture, the assignment of the husband does not operate upon it.

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In *The Duke of Chandos v. Talbot* (a), the wife had attained the age of twenty-five when the question came before the Court, and the husband had a complete control over the property in dispute. *Theobald v. Duffoy* (b) has no bearing on the subject. It was decided on the ground that the wife had joined, and joined with the consent of her friends, in assigning a term. It is mentioned by Lord *Hardwicke*, in one of the cases I have referred to, *Bush v. Dalway* (c), and he states what the ground of decision was.

Thus, it appears, that there is no one distinct decision at variance with the judgment of Sir *Thomas Plumer*; and if some dicta can be cited against it, these are opposed by conflicting dicta. Therefore, when I consider the principle which I originally laid down, that, where a husband assigns an interest belonging to his wife, and thereby agrees to do every thing in his power to make that assignment effectual, the assignment will be valid against the wife only in those cases in which he is able to reduce the thing into possession — when I further find that principle supported by the

opinions

(a) 1 *P. Wms.* 602.

(b) 9 *Mod.* 102.

(c) 1 *Ves. sen.* 20. 3 *Atk.* 535.

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opinions expressed by Sir *William Grant*, and by two distinct decisions of Sir *Thomas Plumer* — and when I find, on the other side, no opposing decisions; — I confess I revert to my original opinion, — the opinion which I should have pronounced, if the subject had been untouched by authority, — that the husband has no power to give effect to a conveyance of property of this description, unless circumstances so turn out as to have put him in a situation which enabled him to have reduced the *chose in action* into possession. If, at the time of the assignment, he is in a condition to reduce the *chose in action* into possession, the assignment operates immediately; if he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the *chose in action* may be reduced into possession, the assignment becomes altogether inoperative.

In the argument, a class of cases were referred to, which related to the taking of the wife's consent in Court. Her consent is taken to bar her equity, where the husband has a right at law; and attempts have been made to have her consent taken with a view to affect her expectancy. In *Woollands v. Crowcher* (a case of that kind), Sir *William Grant* says (a), “In this instance the object is not to bar her equity to have a settlement, but to bar the right to survivorship; for upon his death it belongs to her entirely. She is giving up, not her equity only, but her entire right by survivorship. That is not the case in which the Court takes her consent. If the husband has a right to convey, let him exercise his right. But why this Court should join and aid him for that purpose, I do not know.” He thus intimates a strong opinion as to what he considered to be the extent of the right and power of the husband over the

(a) 12 Ves. 177.

the reversionary interest of the wife. It is true, in that case, he afterwards took the consent of the wife; but it was taken only *de bene esse*; so as not to prejudice the question, in the event of her being the survivor.

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In the two cases before Lord *Alvanley*, which are mentioned in *Woollands v. Crowcher*, the consent of the wife seems to have been taken; but we know nothing of what was said before that Judge, so that no reliance can be placed on them. Neither can any reliance be placed on *Howard v. Damiani* (a), which was a mere order by consent. I pass entirely over *Mitford v. Mitford* (b), and other cases in which the assignments were under a commission of bankrupt. Sir *William Grant*, in giving his decision in *Mitford v. Mitford*, expressly drew the distinction between the particular assignee and a general assignee; and he drew it for the purpose of obviating difficulties in the way of the case, — difficulties which he did not think it necessary to combat. If he founded his conclusion in taking that distinction, it would not be very legitimate reasoning to adduce his decision in that case in support of the judgment of Sir *Thomas Plumer*. In *Gayer v. Wilkinson* (c), Lord *Bathurst* took the same distinction for the same obvious reason. I therefore leave those cases entirely out of my consideration.

It is said, that the husband may release the possibility of the wife; and reference is made to the *dictum* of Lord *Holt* in *Gage v. Acton* (d), “that, when the wife has any right or duty, which by possibility may happen to accrue during the marriage, the husband may by release discharge it.” Whether that *dictum* be or be

(a) 2 *Jac. & Walk.* 458.

(b) 9 *Ves.* .

(c) 1 *Bro. C. C.* 50.

(d) 1 *Salk.* 527. 1 *Ld. Raym.* 115.

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be not accurately reported, I will not undertake to say; but, in the judgment in which it occurs, Lord *Holt* differed from the rest of the Court, and the decision was contrary to his opinion. From the decision there was an appeal, which was afterwards abandoned. Lord *Kenyon*, when the case was cited before him, pronounced the opinion there delivered by Lord *Holt* to be "as repugnant to the rules of laws as of equity." (a) Lord *Holt*, according to the report in *Raymond*, cites *Lampet's* case, but *Lampet's* case does not support the position in the unqualified way in which he states it.


Suppose the husband could release the wife's possibility at law, I do not see how it follows that he can, therefore, assign it in equity. Admit the position, that he can release it at law, to be uncontrovertible: he cannot make his own title perfect, unless he reduces it into possession. Why, therefore, should he be able to assign it in equity, and give another a title which he has not himself?

After considering the question in all its bearings, and the authorities and principles on the one side and on the other, these are the reasons which lead me to the conclusion, that the judgment of the Master of the Rolls in *Purdew v. Jackson* was right, and that the husband, dying while the wife's interest continued reversionary, has no power to make an assignment of property of this description, which shall be valid against the wife surviving.

There are other circumstances, independently of the general question, which have been alluded to in this case. It is alleged, that there has been waiver and
acqui-


(a) 4 T. R. 385.

acquiescence on the part of the wife, because the suit was not instituted, and the assignments were not called in question, till more than seven years after the husband's death. But the tenant for life did not die till *April* 1824, and the bill was filed in the following month. The wife was not called on to take any step till the death of the tenant for life.

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The assignment to *Streater*, which the wife executed after her husband's death, refers to the former assignments, and is stated to be made subject to them; which, it is argued, amounts to a recognition and confirmation of these assignments. It would be too much to attribute such an effect to such recitals and such phrases: they were intended merely to state the order in which the assignments were to have priority.

I must declare, that the four assignments, made during the husband's lifetime, cannot be sustained.

1829:
ROLLS.
March.

WATSON v. DENNIS.

THE bill was filed by a person claiming under an assignment of a married woman's reversionary property, executed by her husband, who afterwards died in her lifetime, and before the fund fell into possession. The cause stood in the paper for hearing at the same time with *Honner v. Morton*; and it was agreed that it should abide the event of the decision in that suit.

After judgment was given in *Honner v. Morton*, it came on before Sir *J. Leach*, Master of the Rolls; and the Plaintiff submitted to have his bill dismissed.

The MASTER of the ROLLS expressed his full assent to the doctrine which had been established by the decisions of Sir *Thomas Plumer* and the Lord Chancellor.

Mr. *Wilbraham*, for the Plaintiff.

Mr. *Sidebottom*, for the Defendant.

1826.

SANSUM v. DEWAR.

ROLLS.
Nov. 6. 25.

IN this suit a sum of 3 per cent. consol. bank annuities had been carried to the account of *Mary Anne Sansum*, as one of the residuary legatees of *Luke Conway*. She resided in *Martinique*, and an order had been made in *August* 1825, that she should be examined apart from her husband, as to the manner in which she wished the money to be paid. .

The fund of a married woman, standing in the name of the accountant-general to her account, may be pledged by her husband.

Upon her examination she directed it to be paid to *James Cavan* and *Michael Cavan*, for the sole use and benefit, and as the proper monies, of her *Mary Anne Sansum*. Previously to the examination, *Sansum* and his wife made oath, that, at their intermarriage, *Sansum*, in contemplation of the claim and rights of *Mary Anne* under the will of *Luke Conway*, made a settlement in the usual *English* form on *Mary Anne*; that, on the 4th day of *May* 1816, he, by a solemn public notarial act, duly executed in *Martinique*, fully acknowledged and confirmed the same settlement; and that the sum of 1608*l.* 17*s.* 8*d.* bank 3 per cent. consolidated annuities, standing in the name of the Accountant General at *London*, in trust in the cause, under the title, “The account of *Mary Anne Sansum*,” and also the interest or dividends which might have accrued on that sum, were the proper monies of *Mary Anne Sansum*.

Sansum and his wife having presented a petition for the transfer of the stock to the *Cavans*, a cross-petition was presented by *Mr. Leach* and *Mr. Lawford*, claiming a lien on this fund.

Mr.

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Mr. *Leach* had conducted the suit on behalf of *Sansum* and his wife under a power of attorney from them; and he had employed Mr. *Lawford* as his solicitor. The lien they claimed was, for the costs of the suit, and of the resistance to a claim set up by the crown against the assets of *Conway*, and for goods sent, as well as advances made, by Mr. *Leach* to *Sansum* and his wife, upon the faith that he was to be repaid out of this money. To prove that the fund had been pledged for his repayment, letters written by *Sansum* and his wife were produced.

The order for carrying over the money to the account of Mrs. *Sansum* was made on the 13th *December* 1824: some of the advances were before, and others, after that date.

The question was, Whether the agreement of the husband, even if made with the concurrence of the wife, could create a lien on the wife's fund, standing in the name of the accountant-general, for goods shipped, and monies advanced to him?

Mr. *Simpkinson*, for the original petition.

The fund belonged to the wife, and, standing in the name of the accountant-general, the husband could not act upon it except through the medium of this Court, and with the consent of the wife, given in the manner which the rules of this Court prescribe.


Mr. *Horne* and Mr. *Glyn*, *contra*.

Nov. 23.

The MASTER of the ROLLS.

The wife's share in the residuary estate of the testator was the property of the husband in her right, and subject to her equity. But it has been contended, that,
standing

standing in the name of the accountant-general in trust in the cause, and being carried to the separate account of the wife, it could not be pledged by the husband. I cannot assent to that position. I think that the party interested in the fund could pledge it, either before or after it was appropriated. A strong *primá facie* case has been made to show that the fund has been pledged; but as *Sansum* and his wife, by reason of their absence from this country, have not had means of meeting the statement contained in the cross-petition, the proper course will be to refer it to the Master to inquire whether *Sansum*, with the concurrence of his wife, agreed to pledge this fund for the monies advanced and goods shipped to him.

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The order was as follows: "That it be referred to the Master to inquire whether any and what money has been advanced, or any and what goods have been supplied, and the amount thereof, by *Thomas Leach* to *Samuel Sansum*, upon the credit or in anticipation of the funds and money now standing in the name, &c. to the credit of this cause (the account of *Mary Anne Sansum*, the wife of *Samuel Sansum*); and if so, whether such advances were made and goods supplied on the credit, or in anticipation of such funds, with the knowledge and consent of the Plaintiff *Mary Anne Sansum*," &c.

Reg. Lib. 1826. B. 260.

1826.

ROLLS.

Nov. 13. 27.

DREWRY v. BARNES.

A court of equity will not appoint a receiver of rates, which are to be assessed by commissioners and collected at a future period.

A court of equity will not interfere in favour of a party, who omits to avail himself of his legal remedy in due time.

A court of equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest, which he neglected to claim at the time when they became due.

Clauses in a local act, providing that persons aggrieved by the commis-

sioners, appointed to carry it into execution, should appeal to the quarter sessions, and that twenty-one days' notice should be given before any action or suit was commenced for any thing done in pursuance of the act, do not apply to the case of a person claiming as an incumbrancer of the rates which the act gave authority to assess and levy, and instituting his suit in order to give effect to his incumbrance.

THE bill was filed by *John Drewry*, the executor of *John Armitage* against *Barnes*, as the vestry-clerk of the parish of *St. Paul, Shadwell*, under the following circumstances.

An act, passed in 1775, for paving, &c. certain places, &c. in the parish of *St. Paul, Shadwell*, empowered commissioners to levy rates and assessments, to borrow money on the credit of these rates, and to secure, in the manner therein mentioned, the repayment of the monies so borrowed.

In 1776, the commissioners, in pursuance of their power, borrowed 300*l.* from *John Armitage*, and signed and delivered to him a security in the form required by the act. That document, dated the 26th of *August* 1776, was to the following effect: — “ We, the commissioners, constituted and appointed, &c., have, in pursuance and by the authority vested in us by the act, borrowed of *John Armitage*, &c., the sum of 300*l.* upon the credit of and chargeable upon the rates and assessments to be made by virtue of the act, for which we have agreed to pay interest at the rate of 4*l.* 10*s.* by the hundred by the year, in the proportion, manner, and form after-mentioned, until the repayment of the principal money:

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Now we, the commissioners, according to our agreement with *John Armitage*, and in consideration of the sum of 300*l.* to us in hand paid, have ordered, directed, and appointed, and by these presents do order, direct, and appoint, to be paid to *John Armitage*, his executors, administrators, and assigns, yearly, and every year, until the redemption of the said rates by the repayment of the principal sum of 300*l.*, exclusive of the interest that shall accrue due thereon as aforesaid, the yearly sum of 13*l.* 10*s.*, as and for the interest of the sum of 300*l.*, at the rate of 4*l.* 10*s.* per cent. per annum, by four equal quarterly payments on the usual feasts, &c.; and which interest shall be paid and payable out of the monies arising by the rates and assessments to be made by virtue of the said act, as the same is thereby directed: provided always, that nothing herein contained shall extend or be construed to give *John Armitage*, his executors, administrators, or assigns, a priority to any other charges made by the commissioners on the rates; but that all such charges shall stand in equal degree." On this document was indorsed a receipt for the money, signed by the requisite number of commissioners.

In November 1794, *John Armitage* died, having appointed three executors, of whom *Drewry* was now the sole survivor. At *Armitage's* decease, the 300*l.* remained due, and *Drewry* received the interest until *Midsummer* 1802. From that time down to 1812, he made no application for the payment of either the interest or the principal due on his security. The reasons which he assigned for his forbearance were, that he had no immediate occasion for the money; that he resided at a considerable distance from *London* (his abode was in *Derby*); and that he placed undoubting confidence in the public body who were his debtors.

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In 1810 an act was passed, extending to other districts besides those included in the act of 1775, which repealed the former local acts, save as to the “recovering, levying, collecting, or receiving any penalties, rates, or assessments due at the time of passing the act; and the payment of the several bonds, annuities, and other debts and sums of money secured, and then remaining due, or subsisting and payable, under those acts or any of them; and which penalties, rates, and assessments, might and should be recoverable, levied, and collected, and bonds, annuities, and debts, paid under the powers and authorities of this act.”

The mode of making the rates was prescribed; and by the forty-eighth section it was enacted, “that all the monies to be raised by the rates or assessments, should be applied and appropriated to the several separate and respective uses and purposes by the act prescribed, in such manner as the trustees or commissioners, or any seven or more of them should from time to time, at any of their weekly, monthly, or adjourned meetings, order and appoint.”

The fifteenth section provided, “that the respective trustees and commissioners, appointed, or to be appointed under this act, shall and may sue and be sued in the name of their clerk or clerks, for the time being,” &c.; and the 117th section, that any person aggrieved by the commissioners should appeal from their determination to the quarter sessions. By the 119th section, it was enacted, “that no action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, or the said recited acts, unless twenty-one days’ notice thereof, signed by the intended plaintiff or plaintiffs, shall be given in writing to

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to the churchwarden or vestry clerk of the said parish for the time being; nor after sufficient satisfaction or tender of amends hath been made to the party or parties aggrieved; nor after six calendar months next after the fact committed, for which such action or actions, suit or suits, should be so brought; and every such action shall be brought, laid, and tried in the county of *Middlesex*, and not in any other county or place; and the defendant or defendants, in such actions and suits, and every of them, may plead the general issue, &c.”

Application being made to the commissioners to pay the arrears of interest, they refused; and, in *February* 1824, *Drewry* filed his bill against their clerk. The prayer was, that an account might be taken of what was due to him in respect of the 300*l.* and interest, and that payment might be decreed to him; or, if the principal were not paid, that provision might be made for keeping down the future interest; and that, for that purpose, the rates and assessments might be applied for his benefit, and a receiver of them appointed.

The Defendant did not pretend that the 300*l.* had been paid, or any part of the interest on it since 1802; but he alleged that the commissioners, though they made from time to time assessments sufficient to meet the actual demands of each successive year, had not been apprised of the existence of this claim; and he submitted, that the Plaintiff had no title to relief in equity, and ought to be left to such remedy as he could procure at law.

It appeared from entries in the commissioners books, that five years' interest on this security was paid at one and the same time, in 1800; and that, in 1802, interest

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was again paid. There were entries made, within twenty years before the filing of the bill, which treated the debt as an unsatisfied demand.

Mr. *Sugden* and Mr. *Knight* for the bill. (a)

It is not denied that the 300*l.*, which was lent on the security of certain local rates, together with an arrear of interest since 1802, is still unsatisfied; and though the act, under the provisions of which the money was originally advanced, has been repealed, the debt is preserved in existence by the new act, and is a subsisting charge upon the present rates. The Plaintiff is, in fact, in the nature of a mortgagee; from the particular nature of the pledge, he cannot obtain actual possession of the mortgaged property by legal process; and he is, therefore, entitled to the assistance of a court of equity. He is one of a body of incumbrancers, each of whom has a right to have the funds, pledged by the legislature for their repayment, duly applied; and if the commissioners decline (as they have done here) to perform their duty, where can the requisite account be taken, and the proper relief administered, except in this Court? In *Knapp v. Williams* (b), Lord *Rosslyn*, alluding to a mortgage of turnpike tolls, says, "the mortgagee would have a right to come into this Court to have an account and a receiver appointed. He would have a right by the aid of this Court, to have the tolls specifically applied to his mortgage." * So this Plaintiff has a right to have the

(a) The cause had been argued before Lord *Gifford* in July 1826, but he died without having given judgment.

(b) 4 *Ves.* 430.

1829.
February.

* In *Dumville v. Ashbrook*, a mortgagee of the tolls of certain roads, under acts of parliament which provided

the rates specifically applied in discharge of the debt, which is secured on them by an instrument, which creates an equitable mortgage or lien.

The

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vided that none of the mortgagees should have any preference over the others, in respect of the priority of their assignments, gave notice to the commissioners to pay off his debt at a given time. They omitted to do so; and he immediately took possession of the turnpike-gates, without having previously instituted any legal proceedings, received the tolls by his own agents, and, though he rendered accounts of his receipts to the commissioners, retained the whole in discharge of his own demand. Another mortgagee, on behalf of himself and all other persons holding securities upon the tolls, except the defendants, filed a bill against *Ashbrooke* and one of the commissioners (a), praying that the income arising from the roads might be applied according to the acts of parliament; that *Ashbrooke* might be decreed to account for what he had received, and might be restrained from collecting the tolls; and that a receiver might be appointed.

Mr. *J. Russell* moved for an injunction and receiver, according to the prayer.

Mr. *Girdlestone*, *contra*, insisted, that the parties should be left to the remedies which they might have against *Ashbrooke* at common law, and that the interposition of a court of equity under such circumstances would be attended with extreme inconvenience, and would not be in accordance with the provisions of the 3 G. 4. c. 126. ss. 47, 48, 49. The forty-ninth section provided, that "such person or persons, who shall obtain the possession thereof (*i. e.* of the turnpike-gates), shall not apply the tolls which may consequently be received by him, her, or them, to his, her, or their own exclusive use and benefit, but to and for the use and benefit of all the mortgagees of the said premises *pari passu*, and in proportion to the several sums which may be due to them as such mortgagees."

It was answered, that, if a party in possession did not apply

(a) 3 G. 4. c. 126. s. 74.

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The number of years, during which the interest has been permitted to run into arrear, can afford no ground of defence, unless in so far as it might raise a presumption that the interest had been paid. But here the fact of non-payment is clear; it is not alleged that the interest has been kept down.

Mr. Shadwell and Mr. Pemberton, for the Defendant.

It might be contended, upon comparing the various clauses of the acts relating to this parish and to the several districts in it, that the securities created under the act of 1775 are not a charge upon the rates which are levied under the act of 1810. But, independently of that objection, the bill is one of a kind hitherto unknown in this Court.

The object of the suit is to throw upon the present parishioners arrears of interest, which, if payable at all, ought to have been paid in each successive year, out of rates levied upon the parishioners of that year. If the interest has not been paid, the fault lies only with the creditor; and it is more equitable that the inconvenience or loss arising from his laches should fall upon himself than upon others. The rule of law, acknowledged in this Court, is, that yearly charges upon rates must be defrayed out of the rates of the year, and that the rates made in one year cannot be applied to defray the bur-

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apply the profits of the property according to the equitable rights of the different parties interested, there was sufficient ground for the appointment of a receiver, and that no more inconvenience would result from appointing a receiver here than in many other cases of daily occurrence.

The Vice-Chancellor made the order for an injunction and a receiver.

thens of preceding years. *Ex parte Fowler*. (a) *Lancaster v. Thomson*. (b) Besides, the act of 1775 extended only to some of the districts, which are included in the act of 1810: so that, if the arrears of interest be paid out of rates levied under the latter act, part of the burden will be thrown upon districts, which, at the time when it became due, were not liable to bear any part of it.

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Another objection to the Plaintiff's claim is, — that there are no means of giving him relief without departing from the usual course of the Court, and creating great embarrassment in the administration of the funds of this parish. Are the rates to be sold under the order of the Court, or are they to be collected by a receiver? Suppose a receiver were appointed, could the Court compel the commissioners to cause a rate to be made? Could it direct a reference to the Master to inquire and certify what the amount of the rate ought to be? Could it compel the commissioners to cause a rate to be made of such amount as the Master might find to be requisite? Even if the rate were made and collected, in what manner would the fund be administered? The Plaintiff is not entitled to be paid in preference to the other mortgagees of the rates; it would be necessary, therefore, to direct all the mortgagees to come to this Court for payment; and the result would be, that the financial concerns of the parish would be administered in the Master's office.

In no case will a court of equity interfere after the lapse of twenty years, except where there is fraud, or where the parties stand in the relation of trustee and *cestuique* trust. The entries, which, it has been alleged, treat

(a) 1 Jac. & W. 70.

(b) 5 Mad. 4.

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treat the debt as an existing demand within twenty years before the filing of the bill, were made by a clerk of a former set of commissioners, acting under the old act of parliament, and for a district different from that which the Plaintiff now seeks to charge, and, therefore, cannot operate as an admission against the present Defendant, or those whom he represents. *Atkins v. Tredgold. (a)*


The Court has no jurisdiction. The Plaintiff complains of the commissioners; but the act, on which he founds his right to relief, has expressly provided, that parties aggrieved by the decision of the commissioners should appeal to the quarter sessions.

In point of form, likewise, the suit is improperly constituted. The bill is filed against the clerk of the commissioners as the sole Defendant. But the clause, giving the right of suing the commissioners in the name of their clerk, was intended to apply only to cases in which the commissioners were accused of improper conduct in the exercise of the powers given them by the act. Here the Plaintiff does not complain of misconduct in the commissioners; but he seeks to make the present rates liable for demands, which arose long before the existing act was passed. There is no clause in the act, which, on a fair construction, enables the Plaintiff to litigate such a question with the clerk of the commissioners. If, however, the Plaintiff is enabled by this act to sue the commissioners in the name of their clerk, he must comply with the terms which it has prescribed to that mode of proceeding: one of those terms is, that twenty-one days' notice of the intended suit must be given; and here the bill was filed without such notice.

Mr.

Mr. Sugden in reply.

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The Court has decreed the payment of money to be raised by a parish rate (*a*); and it can, by means of a receiver, bring under its control funds sufficient to answer the purposes of such a suit as this, without involving itself in the administration of all the rates of the parish. Such cases as *Lanchester v. Thomson* have no application to the circumstances which occur here: for this claim is made by a mortgagee, of whose debt the commissioners in each successive year were aware, and for the interest of which they ought to have made provision. Their duty was to have set apart, and to have accumulated, the interest due on his security; for they knew it to be, and they treated it as, an existing debt. The entries in the book are admissions of the debt; and, being admissions made by those who then represented the fund pledged for payment, they must bind the persons who now represent that fund. As the Plaintiff seeks to enforce a claim against the commissioners, his case must come within the provision that the commissioners shall sue and be sued by their clerk. From the tenor of the language of the clauses which relate to appealing to the quarter sessions, and require twenty-one days' notice to be given of the intended commencement of any action or suit, it is quite clear they were meant to apply to complaints of improper conduct on the part of the commissioners in carrying the act into effect, and not to proceedings instituted by incumbrancers on the rates, for the due payment of their principal and interest.

The MASTER of the ROLLS.

November 27.

One of the points, on which the Defendant relied, was, that the Plaintiff had no right to come to this Court for relief,

(*a*) See the cases referred to in 1 *Jac. & W.* 74.

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relief, because a precise and specific remedy is pointed out by the act, which provides that persons, who are aggrieved by any order of the commissioners, may appeal to the quarter sessions. It must, however, be perfectly obvious, that that clause has no application to a proceeding of this nature.

It was also contended, that this suit could not be maintained, in consequence of the Plaintiff not having given the notice required by the act. I am of opinion that the clause, which directs that no suit shall be commenced against any person for any thing done in pursuance of the act, until a certain notice has been given, has no reference to a proceeding of this nature. It applies to actions at law instituted against the commissioners, or those who act under their authority, for any alleged violence or impropriety of conduct, under colour of the act, in carrying it into effect.

For the Plaintiff it was argued, that the money had been lent, and had not been repaid; that he must be entitled to some remedy, and that, as he could have no remedy at law, he must have a remedy here; — not because it is a matter of course that he, who has no remedy at law, should have a remedy in equity, but because, in a case of this kind, and, under the circumstances which exist here, there must be a remedy somewhere.

In what situation do these parties stand? The commissioners are public officers, having a public trust and a public duty to perform: part of their duty is, to raise the sums necessary for the purposes of the act: they are bound to make proper rates, and, out of the monies arising from such rates, to pay the interest of the debts which are secured on them. It is clear, that, in a case of this kind, if a public officer neglects to fulfil
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the trust reposed in him, the Court of King's Bench will, by a *mandamus*, compel him to perform his duty. It is the daily practice of that Court to call on parties to make rates, and to apply them. Putting, therefore, the lapse of time out of the question, I apprehend the Plaintiff is not without remedy.

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I do not say, whether, after the lapse of so long a time, a *mandamus* would be granted with respect to the past interest on the debt; nor is it necessary for me to give any opinion on that point. For, if a party, having a remedy at law, loses it by his own laches, he cannot come into a court of equity on the ground of his having, by his negligence, lost his legal remedy.

The substantial relief prayed by this bill is an account and the appointment of a receiver. To direct an account amounts to nothing, unless a receiver be appointed; and I am of opinion, that a receiver ought not to be appointed. No case has been cited of the appointment of a receiver by this Court, where the rates were to be fixed by a future assessment, and to be collected at a future period. A case has been referred to, in which it was said that a receiver of tolls might be appointed, but that doctrine was applied to circumstances very different from those which occur here. The tolls, of which it was there said a receiver might be appointed, were fixed payments: they were in the nature of rent: here there is no fixed sum to be paid: it is the commissioners who are to impose the rate; and, until the rate be imposed by them, there is nothing which a receiver could collect. Suppose that the rate imposed by the commissioners were not sufficient to answer the other purposes of the act, and to keep down the interest of the bonds, what would be the next step to be adopted? The parties would have to apply to the Court of King's Bench,


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Bench, in order to compel the commissioners to make an adequate rate. But, on the same motion on which they are ordered to make a rate, directions may be given as to the mode in which the proceeds of the rate are to be applied. Why then come to this Court for relief, when it may be requisite that something should be done, which a court of equity cannot do, and all that it is necessary to do may be done in a court of law? To appoint a receiver of such rates would be productive of great public mischief, and of extreme inconvenience to this particular parish in the administration of its parochial concerns.

Much has been said as to the hardship of the Plaintiff's case. I do not say, that his case is without hardship; but the hardship is by no means on one side only. As to the interest accruing, or to accrue, I do not think that he is without a remedy; and with respect to the by-gone interest (I do not say whether or not he is there without a remedy), even if he should be without redress, the hardship is not greater than that of which other persons would have to complain, if the relief he seeks were granted. Suppose I were to appoint a receiver, and were to decide, that all the arrears of interest for the last twenty-five years were to be paid out of the future rates; by whom would that burden be borne? By the present occupiers. By whom ought it to have been defrayed? By the by-gone occupiers. Would it not be a case of extreme hardship, if, by the laches of the Plaintiff, there were thrown on the present occupiers of houses in the parish the whole of a burden which ought to have been borne by those who were inhabitants in past years? If an overseer happens to disburse considerable sums for the relief of the poor beyond the actual amount of the assessments of the year, it might be deemed very reasonable that he should be indemnified out of the rates

rates of the following year. Courts of law, however, have held otherwise, and upon a very sound principle. They have said, that the burden of the year must be borne by those who, during that year, answer the description of occupiers; and, therefore, that an officer, who disburses for parochial purposes more than the amount of the parochial assessments, shall not be reimbursed out of the assessments of a succeeding year. That principle of law is applicable to the present case.

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For this reason I am of opinion, that this bill must be dismissed; but, taking all the circumstances of the case into consideration, I do not think it ought to be dismissed with costs.

Bill dismissed, without costs.

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November 14.

WILLAN v. LANCASTER.

By the custom of the manor of *Shap*, the legal interest in lands of customary tenure, parcel of the manor, is not devisable, but is transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words are, "bargain, sell, and surrender," and on the presentment or production of which, admittance is granted to the alienee; but an equitable interest in such customary lands


EDWARD WILLAN was seised, among other lands, of a tenement and hereditaments of customary tenure and parcel of the manor of *Shap* in *Westmorland*.

It appeared by the report of the Master in this cause, that, by the custom of the manor of *Shap*, estates holden of the manor were customary estates of inheritance, descendible and descending from ancestor to heir, according to the custom, subject to the payment of a tenpenny fine, or a fine of ten times the amount of the lord's rent on descent or alienation; that such customary estates passed by descent to the eldest son, or eldest heirs male of the tenant dying seised, and to the eldest female heir solely, in exclusion of a younger female heir; that they were sold, passed, or transferred by deed of bargain and sale, having the effect of a surrender, in which the operating words were, "bargain, sell, and surrender;" that, on the presentment of such a deed of bargain and sale by the verdict of the homage jury at a court, or, sometimes, on the production of the

is capable of being passed by devise without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them by a deed of bargain, sale, and surrender, to a trustee, upon trust for such person as the tenant, by any deed or instrument in writing or by his last will or any codicil thereto or any instrument in the nature of a last will or codicil, to be by him legally executed, should appoint or devise the same; and under this conveyance the trustee was admitted: Held, that the equitable interest in the lands would not pass by an unattested codicil of the tenant.

A will began as follows:—"In the first place, I will that all my debts and funeral charges be paid and discharged by my executors hereinafter named. Then I give and bequeath unto my eldest son, *Richard Willan*, my estate at *Shap*, on condition that he make up the deficiency in the payment of the two legacies which I have left to my younger son and daughter:" Held, that the testator's debts were not charged on the estate at *Shap*.

the deed out of court, admittance was granted to the alienee; that, by the custom of the manor, estates within or parcel of the manor, and whereof the tenant died seised, were not devisable by the will, but passed to the heir at law or customary heir of the tenant dying seised; that, in order to avoid the effect of the custom, and to enable the owner of customary estates to dispose of them by will, it had been the common practice for such owner to convey the customary estate, of which he was tenant, or which he had purchased, to a trustee nominated by him, who was admitted tenant generally to him and his heirs, and executed out of Court, a declaration of trust, that he and his heirs would hold the lands in trust for the owner, and to and for such uses, intents, and purposes as the owner should, by deed or will limit, direct, or appoint; and that, such owner being then entitled only to an equitable interest in the customary estate, such interest thereupon became the subject of, and was capable of being passed by, devise, without regard to the custom.

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By indenture, bearing date the 4th day of *February* 1818, and made between *Edward Willan* of the one part; and *Isaac Wilson* of the other part, *Edward Willan*, for a nominal consideration, granted, bargained, sold, aliened, surrendered, and confirmed the customary hereditament therein described unto *Isaac Wilson* and his heirs in trust for the said *Edward Willan*, to the intent that he might be able to dispose of the same according to the uses thereafter mentioned. By another indenture of the same date, and between the same parties, it was witnessed, that, in order to declare the uses, intents, and purposes for which the premises had been conveyed, *Wilson* did thereby for himself, his heirs, executors, and administrators, covenant, promise, and declare to and with the said *Edward Willan*, his heirs and assigns,
 that

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that he *Wilson*, his heirs and assigns, should stand seised of all the said customary messuage, lands, and premises, in trust for the said *Edward Willan*, and to permit him to hold and enjoy the same during his life, and, after his decease, to the use of such person or persons, in such shares and proportions, and under and subject to such powers and provisos, limitations, declarations, and agreements, as the said *Edward Willan* during his life, by any deed or deeds, instrument or instruments in writing, or by his last will and testament in writing, or by any codicil or codicils thereto, or any other instrument or instruments in writing purporting to be in the nature of such last will and testament or codicil or codicils thereto, to be by him legally executed, should order, direct, limit, or appoint, or should give and devise the same premises, or any part thereof; and, in default of any such order, direction, limitation or appointment, gift, or devise, or so far as the same should not extend, to the use of *Edward Willan* during his life without impeachment of waste, and, from and after his decease, to and for the use of his heirs and assigns, according to the custom of the manor of *Shap*.

Under the conveyance to him, *Wilson* was duly admitted, and was the legal tenant of the premises.

Edward Willan made his will in *April* 1820, executed and attested according to the statute of frauds, which contained, among others, the following clauses: — “In the first place, I will that all my debts and funeral charges be paid and discharged by my executors hereinafter named. Then I give and bequeath unto my eldest son, *Robert Willan*, my estate at *Shap*, on condition that he make up the deficiency in the payment of the two legacies which I have left to my younger son and daughter. I will that *Askew House* and land, and the cottages,

cottages, be sold; and all my stock to be sold; that allotment also to be sold situate above the toll-bar. The cottage-house at *Tebay* to be sold, and also two fields upon *Orton Low Moor*, now in the occupation of *Edward Sisson*. Also my estate called *Wood End*, near *Tebay*, is to be sold, if my debts and expenses cannot be defrayed and discharged without it. Then I give and bequeath unto my youngest son, *Thomas Willan*, the sum of 750*l.*, to be paid to him when he arrives at the age of twenty-one years. I also give and bequeath unto my only daughter, *Elizabeth Willan*, my estate at *Sleddale*, called *New Ing*, with turbary, and in addition to this estate, the sum of 200*l.* in money, to be paid to her when she arrives at the age of twenty-one years," &c.

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By a subsequent codicil, not executed and attested according to the statute of frauds, he made a different disposition of the *Shap* estate.

The cause came on to be heard before Lord *Gifford*, Master of the Rolls, and the question was, Whether a codicil, not executed according to the statute of frauds, would pass the equitable interest in a customary estate of this description?

On the one side it was contended, that, with respect to the mode of devising, customary freeholds, holden of the manor of *Shap*, must be considered as analogous to copyholds or customary freeholds passing by surrender, and would, therefore, pass by an unattested will.

On the other hand it was argued, that the customary freeholds in this manor did not pass by surrender, but
 were

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were conveyed by deed. They possessed all the essential qualities of freehold tenure; and there was no pretext for saying, that the freehold was in the lord or in any person other than the tenant.

August 9.


Lord GIFFORD, MASTER of the ROLLS.

The trust of the conveyance to *Wilson* is for such person or persons as he, by any deed, or by his last will, or by any codicil, or by any instrument in the nature of a last will or codicil, to be by him legally executed, should appoint or devise the same. With reference to the particular words of this declaration of trust, a different question arises from the general point which was argued. It is one question, whether the equitable interest in a customary freehold like this can pass under a testamentary paper not executed and attested according to the statute of frauds; it is a different question, whether, under the power given by the deed of *February* 1818, this codicil will be effectual. What is to be the construction of the words, "to be by him legally executed?" The testator might have meant, "executed according to the statute of frauds." Whether the equitable interest of a customary freehold will or will not pass by a will not attested, the difficulty still remains, whether, under such a declaration of trust as exists here, the appointment made by an unattested codicil can be operative. As the question was not considered at the bar in this point of view, let the cause stand over, to be again argued in *Michaelmas* term.

November 14. The cause was again argued before Sir *John Copley*, Master of the Rolls.

The

The following cases were referred to, *Tuffnell v. Page* (a), *Wagstaff v. Wagstaff* (b), *Hussey v. Grills* (c), *Doe v. Danvers*. (d)

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The MASTER of the ROLLS was of opinion, that the customary lands did not pass by the codicil.

Another question was, Whether the will created a charge on the lands in *Shap* for the payment of the testator's debts?

In support of the proposition that the lands were so charged, reliance was placed chiefly on the phrases, "In the first place—and then I give," &c. This form of phraseology shewed, it was alleged, that the first object of the testator was to have his debts paid, and that it was only after his debts were paid, and not sooner, that he meant his eldest son to have the estate at *Shap*.

The Master of the Rolls was of opinion, that the estate at *Shap* was not charged with the payment of the testator's debts.

Mr. *Sugden* and Mr. *Simons* were for the Plaintiffs, the younger son and daughter of the testator:

Mr. *Wray*, for the heir at law.

(a) 2 *Atk.* 37. and *Barnard.* 12.
 (b) 2 *P. Wms.* 258.

(c) *Ambl.* 299.
 (d) 7 *East*, 299.

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Nov. 17. 20.

December 17.

ROBINSON v. PAGE.

Upon a bill, praying the performance of an agreement duly signed, but offering to the Defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the Court will decree a specific performance of the agreement with those variations, if the Defendant elects to take advantage of them; and if the Defendant does not so elect, it will decree a specific performance of the original agreement.

Treaty and negotiations for a variation of the terms of a contract will not amount to a waiver, unless the circumstances shew, that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract.

IN *February* 1824, *Robinson*, a banker at *Nottingham*, contracted verbally to purchase *Stanton* farm from *Page* at the price of 9500*l.*; and, on the 25th of *February*, *Page* and his son received the amount of a check for 300*l.*, drawn by them on the banking-house, in which *Robinson* was a partner, and expressed to be on account of the purchase-money of the farm. On the 5th of *March*, *Robinson* and *Page* signed a written agreement, which was in the following words: "I hereby agree to sell to Mr. *Robinson* the whole of my farming lands, containing together about 200 acres, situate in the parish of *Stanton*, together with the house, barns, and farming premises adjoining, as well as all the timber and other trees growing or being upon the said farm, for the sum of 9500*l.*; and in case, at any future time, a further demand should be made and established for any tithe upon any of the said lands, I agree to pay one half of the value to the rector, Mr. *Robinson* paying the other half; Mr. *Robinson* to have possession and commence as landlord at *Lady-day* next ensuing; the annual rent of the farm to be 340*l.*"

On a subsequent day, according to the allegations in the bill, a formal arrangement was entered into, by which some variations were made in the contract; and *Robinson*, being then at *Page's* house, wrote and delivered to the latter the following memorandum of those variations: "The purchase-money of Mr. *Page's* farm to be 9200*l.*; Mr. *Robinson* to lend on bond 300*l.*

at

at 4 per cent. interest; the annual rent of the farm to be 322*L*; Mr. *Robinson* to take all the tithes upon himself. *March* 12th, 1824." It appeared that this memorandum, though it bore date on the 12th of *March*, was made on the 13th of *March*.

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Page having refused to make out a title and to convey the estate, *Robinson* filed his bill, stating that he was willing that the memorandum of the 12th of *March* should or should not be acted upon in the performance of the contract as the Defendant might elect, and praying that he might be compelled to perform the agreement of the 5th of *March*, either upon the terms contained in it alone, or on the terms contained in it and the subsequent memorandum.

The answer insisted, that the Plaintiff had abandoned the contract of the 5th of *March*; that the memorandum of the 13th of *March* proceeded upon an entirely new treaty; and that the memorandum also had been abandoned.

The circumstances of the alleged abandonment were stated in the evidence of the Defendant's son, who had been present at the interviews of the parties. "On *Saturday* the 13th of *March*," said the son in his deposition, "the deponent, at the request of the Defendant, went with him to talk to the Plaintiff about making a second agreement for the farm, the Defendant having informed the deponent that the first agreement had been abandoned on the *Wednesday* preceding. The Defendant and deponent called at the Plaintiff's banking-house, when the Plaintiff and the Defendant, in the deponent's presence, entered into an agreement touching the sale of the farm. At the commencement of the interview, the Defendant observed to the Plaintiff, 'As you have refused the farm on account of the tithes, I shall

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take money upon it;' to which the Plaintiff said, "O, you will keep it, and take money on mortgage; very well, I am quite willing." The Defendant replied, "Yes, Sir." Some further consideration ensued as to the sum the Defendant would be able to borrow on mortgage; and, on the Plaintiff remarking, that the Defendant would not be able to obtain more than 7500*l.* on mortgage, the Defendant began to converse about the sale of the farm to the Plaintiff on different terms; and, on the same being settled between them, the terms were reduced into writing by the Plaintiff, and the writing was delivered by the Plaintiff to the Defendant. Afterwards, on the 24th of *March*, the deponent and the defendant went to the banking-house of the Plaintiff, who asked the Defendant what he wanted with him; the Defendant answered, he did not feel satisfied with the last agreement they had made about the farm; and, the Plaintiff having asked why, the Defendant replied, that the Plaintiff had gone from his first agreement, and he, the Defendant, wished to go from the second. The Plaintiff said, "O, very well; what do you want more?" The Defendant answered, he wanted 1000*l.* more than the price mentioned in the last agreement. The Plaintiff said, "I shall not give any more money; I shall give it up." The Defendant then replied, if Mr. *Robinson* did not buy it, he should waive the sale for a while till *June*. The Plaintiff said, he might call on the *Saturday* following, and he would consider of it. On *Saturday*, the 27th of *March*, the deponent again accompanied the Defendant to the house of the Plaintiff, and the Defendant then told the Plaintiff, he should have the farm for 10,200*l.* After some observations, the Plaintiff said, he would give him 9500*l.* for it, and take the tithes upon himself; on which the Defendant said, he would throw off 200*l.* and take 10,000*l.* for it: the Plaintiff refused, and said he would not give any more money, and that the Defendant might sell it to whom he pleased. The Defendant said, he should

should like the Plaintiff to have it, and wished him to call at *Stanton* on the *Tuesday* or *Wednesday*. Accordingly, on *Wednesday* the 31st of *March*, the Plaintiff called at the Defendant's house at *Stanton*, and observed to the Defendant's wife, that he had offered, on the preceding *Saturday*, 300*l.* more for the farm. The Defendant at this time came into the room, and told the Plaintiff, he should get Mr. *Dodson* to look over the farm, and have part of it surveyed; and that he, the Defendant and Mr. *Dodson*, would call upon the Plaintiff in *Nottingham*. The Plaintiff answered, "Then nothing more can be said at this time," and left the house. On the 8th of *May* following, the Defendant, along with the deponent, called on the Plaintiff at his house in *Nottingham*, and told him he had altered his mind as to selling the farm, and having determined to take up money on mortgage, desired to know, if the Plaintiff could lend him what money he wanted. The Plaintiff replied, he should insist on the Defendant's performing one of the agreements, and would give him his choice; to which the Defendant answered, he considered himself free from both agreements, and should not perform either of them.


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Mr. *Shadwell* and Mr. *Knight*, for the Plaintiff. (a)

The Plaintiff has a right to insist on the performance of the original contract; but as he admits that it was subsequently varied in the points mentioned in the memorandum, the Defendant may, if he pleases, have the benefit of those variations. *Ramsbottom v. Gosden* (b) shews, that the Court will decree performance of a written agree-

(a) The cause was first argued time of his death, judgment had before Lord *Gifford*; but, at the not been pronounced.

(b) 1 *Ves. & Beames*, 165.

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agreement with variations subsequently introduced into it. It would be dangerous to give much credit to the evidence of the son as to what passed subsequently to the 13th of *March*; but the circumstances, even as stated by him, do not amount to an abandonment of the contract.

Mr. Sugden and Mr. Phillimore, contra.

The Plaintiff admits that he is not entitled to have the agreement of the 5th of *March* performed; and the fact of the subsequent variations would constitute a good defence to a bill, asking the performance of the original agreement. He, therefore, prays the Court to carry into execution the original agreement, as varied by the unsigned memorandum; in other words, to carry into execution an agreement with parol variations, that is, an agreement of which some material terms are contained in an instrument signed according to the statute of frauds, and other material terms are not contained in an instrument so signed. In such a case, a court of equity does not interfere. *The Marquis of Townshend v. Stangroom* (a), *Honer v. Read*. (b) *Ramsbottom v. Gosden* was a case not of subsequent variation, but of an agreement, which, by the mistake of the solicitor who prepared it, varied, at the time of signing it, from the intention of the parties. Besides, the plaintiff there sought to enforce the performance of the written agreement, and the defendant appears to have offered to perform it, with such a variation as would render it conformable to the actual intention. The defendant did not resist, as is done here, the performance of the contract, either with or without variation; and the decree must have proceeded on his submission.

The

(a) 6 *Ves.* 328.

(b) 9 *Mod.* 86.

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The transactions after the 13th of *March* do not rest on the single evidence of the Defendant's son, for they are affirmed also by the oath of the Defendant in his answer; and they imply and amount to a waiver of any preceding agreement. The conduct of the parties is altogether irrational, except upon the supposition that both of them considered themselves unfettered by any previous contract.

The MASTER of the ROLLS.

December 11.

The Plaintiff by his bill prayed a specific performance of the agreement entered into on the 5th of *March*; offering at the same time to have the agreement executed, in case the Defendant should so wish, with the variations introduced by the memorandum of the 13th of *March*.

On the part of the Defendant it was contended, that the agreement of the 5th of *March* was altogether abandoned; and it was said, and authorities were cited to shew, that parol waiver and abandonment might be set up as a defence to a bill for specific performance. Unquestionably, waiver, even by parole, would be a sufficient answer to the Plaintiff's claim. But it has been laid down in all the cases, that such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into. In *Price v. Dyer*, Sir William Grant, speaking of the waiver of a certain agreement, says (a), "The waiver spoken of in this

(a) 17 *Ves.* 364.


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this case is an entire abandonment and dissolution of the contract, restoring the parties to their former situation." The question, therefore, in this cause, is, whether, under the circumstances which are here brought before me, I am satisfied that there was an absolute dissolution and abandonment of the contract of the 5th of *March*.

It was contended on the part of the Defendant, that what occurred on the 13th of *March* amounted to such a dissolution and abandonment; and, for the purpose of establishing that fact, reference was made to the memorandum of that date, and to the evidence of the son. According to the evidence, it was observed by the Defendant, in the course of the conversation between him and the Plaintiff, that, as the Plaintiff had refused the farm on account of the tithes, he, *Page*, was desirous of taking up money on mortgage; that the Plaintiff replied, that he was quite willing that the Defendant should do so, but stated his belief, that not more than 7500*l.* could be raised on it in that manner; that the Defendant, as that sum would not be sufficient to relieve his necessities, entered into a further treaty for the sale of the estate to the Plaintiff; and that the terms were settled between them, and were reduced into writing in the memorandum. Now that memorandum refers in all its parts to particular stipulations in the original agreement. By the original agreement, in case the rector established a claim to tithes, one half of the burden was to be borne by the vendor; by the second, the price was reduced from 9500*l.* to 9200*l.*, and the purchaser was to take the risk of the rector's claim upon himself. The vendor was to remain in the occupation of the farm, but the rent was to be reduced from 330*l.* a year, as fixed by the first contract, to 322*l.*; and to make up the sum of 9500*l.*, which was the price originally specified,

cified, it was stipulated that *Robinson* should lend *Page* 300*l.* on his bond. Now, in the whole of this transaction, it does not appear to me, that, when the treaty was entered into for this variation, there was any intention in the mind of the parties to abandon the original contract. It is laid down in the authority I have referred to, that, where parties have entered into a binding agreement in writing, and variations are afterwards introduced by parol, or by an instrument not signed according to the statute of frauds, these variations are not sufficient to prevent the execution of the agreement, and are no answer to a bill for specific performance. Therefore, even on the case stated by the Defendant as to this part of the transaction, the Plaintiff would be entitled to the relief he prays.

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It is said, that, after the 13th of *March*, the parties met and had communications, in which the contract was treated as abandoned; and the same person, the son of the Defendant, is the material witness as to what passed on these occasions. He states, that, on the 24th of *March*, the Plaintiff and the Defendant again met at the banking-house; when the Defendant said to the Plaintiff, “As you went from the first terms, I am desirous of drawing back from the second:” the Plaintiff answered, “Very well; what do you want more?” *Page* stated, he wanted a higher price; and *Robinson* said, “I shall not give any more money; I shall give it up.” Was that assented to on the part of the Defendant? Did he instantly say, “Well, there is an end and dissolution of the agreement: let it be given up instantly?” On the contrary, nothing took place, except an appointment to meet at a future time, in order to consider the subject. On that subsequent day they did meet. *Page* proposed, that he should have 10,200*l.* for the farm: *Robinson* offered 9500*l.*, and to take the risk

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risk of the claim of tithes on himself; *Page* altered his proposal to 10,000*l.*: *Robinson's* answer was, "that he would not give more than 9500*l.*, and that *Page* might sell the farm to whom he pleased." Did *Page* ever take advantage of *Robinson's* offer? In order to constitute an abandonment of a contract, the act must be mutual. Here, instead of assenting to the abandonment, *Page* replied, that he wished the Plaintiff to have the farm, and requested that he would call at his house on the *Tuesday* or *Wednesday* following. *Robinson* did call on that day; and, according to the evidence of the son, informed the wife of the Defendant that he had offered 300*l.* more for the farm: the Defendant stated that he would have the farm surveyed, and that he and the surveyor would call on the Plaintiff in *Nottingham*; and the Plaintiff went away, observing, "Then nothing more can be said at this time." Such is the substance of the evidence of the son; and, giving full effect to every word of that evidence, I do not see sufficient to satisfy me, that the parties intended to abandon the agreement. There was a desire on the one side to get a higher price; there was a disposition on the part of *Robinson* to give something more, though not so much as was demanded; but I do not find, that the original agreement entered into between the parties, or the variations subsequently made in it, were abandoned by any thing that took place.

It is material on this occasion to consider, who the person is, on whom lies the whole weight of the case, as stated by the Defendant. He is the heir-at-law of a very old man, and might have some view to the inheritance of this property. The story he tells is in an extreme degree improbable. What reason is there to suppose, that the Plaintiff, who had no reason to be dissatisfied with his bargain, would consent to abandon the agreement; and, at the very same moment, enter
 into

into a new treaty for the purchase of the same property at an advanced price? There is another circumstance not immaterial. As the conversation of the 24th of *March* took place at the house of the Plaintiff, where the original agreement was entered into, and where, in all probability, it remained, it seems a little singular that the agreement was not cancelled, if they meant it should be abandoned, and that it should have remained uncanceled in the possession of the Plaintiff, while the memorandum, containing the variations, remained in the hands of the Defendant. Had the meeting occurred at a place distant from the spot where the agreement was deposited, that might have afforded an explanation of the circumstance. But, as the case stands, there is nothing to weaken the force of the observation, except only in this respect, that the parties seem to have had much confidence in each other, and did not even think it necessary to keep copies of the instruments which remained in their possession respectively.

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My opinion is, that the right of the Plaintiff to compel a specific performance is not affected by any thing that has taken place; and, as he has offered that the performance should be with the variations introduced by the memorandum of the 13th of *March*, the decree must be in that form, if the Defendant thinks proper to accept the offer. If the Defendant does not accept it, the decree must be for a specific performance of the agreement of the 5th of *March*.

Mr. *Sugden*, for the Defendant, declined to make any election: and the decree was for the specific performance of the agreement of the 5th of *March*.

The suit was terminated by an amicable arrangement; and the decree does not seem to have been drawn up.

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POPE v. WHITCOMBE.

A testatrix gave the interest of the residue to her brother during his life, and, after his death, she gave the residue to her executors, in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the mean time; of these four persons, two died during the life of the brother: Held, that they did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors.

During the lifetime of the testatrix's brother, one of the two survivors assigned all

her furniture, plate, &c. and all other the estate and effects, of or to which she was then possessed or entitled, to trustees, upon trust for her creditors: this assignment did not pass her contingent interest in the testatrix's residuary estate.

MARY CHILDE by her will gave certain legacies; and then, "as concerning the rest and residue of her estate and effects, money, securities for money, stock in trade, and debts to her owing independent of her husband, and which had come to her, or she had acquired since his death, she did give and bequeath the interest, dividends, and produce thereof, as they should arise, accrue, due, and become payable, unto her brother *William Pope*, during his natural life, directing her executors to put and place out, or vest such residue in any manner they should think proper in the mean time, and until his death; and from and after his decease, she did give and bequeath such residue unto her said executors and the survivor of them, and the executors and administrators of such survivor, in trust for *William*, son of her brother *William Pope*, and *Arthur, Sarah, and Elizabeth Groombridge*, children of the then lately deceased *Arthur Groombridge*, and the survivors and survivor of them, share and share alike, to be paid or assigned to them respectively as they should attain the age of twenty-one years, with interest in the mean time, and until they should be entitled unto and receive their shares respectively of the said trust premises."

William Pope, the father, died in the month of *January* 1825: *William Pope*, the son, and *Elizabeth Groombridge*, died in the lifetime of *William Pope* the father: and *Arthur*

Arthur Groombridge and *Sarah Groombridge*, on the death of *William Pope* the father, claimed to be entitled in equal shares to the residue so bequeathed by the will of *Mary Childe*.

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In the year 1816, *Sarah Groombridge*, by deed, reciting that she had proposed to assign all her estate and effects to *Joseph Lowe* and *Samuel Goujon*, in trust for themselves and her other creditors, did, in pursuance thereof, bargain, sell, assign, and transfer unto *Lowe* and *Goujon*, and their executors, administrators, and assigns, "all and singular the household furniture, plate, linen, and china, stock in trade, goods and merchandize, debts, sums of money, bills, notes, and securities for money, and all other the estate and effects whatsoever and wheresoever, of or to which she, *Sarah Groombridge*, was then possessed of or entitled," to hold the same unto *Lowe* and *Goujon*, their executors, administrators, and assigns, upon the trusts therein mentioned, for the benefit of her creditors.


Petitions were presented in this cause, which raised two questions:

First, whether the personal representatives of *William Pope* the son and *Elizabeth Groombridge* were entitled to a share of the residue; or whether the whole of the residue vested, upon the death of *Pope* the father, in *Arthur Groombridge* and *Sarah Groombridge*?

Secondly, whether the deed executed by *Sarah*, in 1816, passed her interest in the residue?

Mr. *Koe*, for some of the parties.

If a fund is given to two or more persons, and to the survivors or survivor of them, the survivorship is to be referred to the period when the division is to take place;
and

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and, when a previous life-estate is given, the period of the division is the death of the tenant for life. *Cripps v. Woolcott* (a), *Daniell v. Daniell*. (b) Therefore, of the four persons to whom the residue is finally given, the two, who survived the tenant for life, are alone entitled.

Mr. Wray, *contra*.

The residue is in fact given to the executors in trust for *William Pope*, during his life (for they are directed to place it out at interest as they may think proper); and, after his death, it is given to them in trust for the four persons who are named, and the survivors and survivor of them. The words of survivorship relate to the death of the testatrix. The bequest is, in substance, a gift to one for life, with remainders over. These remainders are *prima facie* vested; and the words of survivorship, which must be admitted to be ambiguous, will not prevent interests from vesting, which, but for them, would be clearly vested.

Mr. Moore, for others of the parties.

On the question, as to whether the share of *Sarah* passed by the assignment of 1816, it was argued, on the one hand, that it was intended to convey only the property of which she had the controul; and that this intention was manifested, both by the enumeration of particulars which preceded the general words, “*all other the estate and effects*,” and by the qualifying clause, which followed them, viz. “*of or to which she was then possessed or entitled*.”

On the other hand, it was said, that the words, “*all the estate to which she was then entitled*,” passed every interest,

(a) 4 *Mad.* 11.

(b) 6 *Ves.* 297.

interest, whether contingent or vested, defeasable or indefeasable, which was then in her.

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The LORD CHANCELLOR.

By the terms of this will, the interest of the residue was given by the testatrix to her brother *William Pope*, and the executors were authorised to place out the fund, as they should think proper, during his life; and, from and after the death of *William Pope*, the residue itself was given to the executors in trust for the persons therein named, and the survivors and survivor of them, share and share alike, to be paid or assigned to them respectively as they should attain the age of twenty-one years, with interest in the mean time, until they should be entitled unto and should receive their shares respectively. By this will, the testatrix bequeathed only the interest of the fund during the life of *William Pope*; the principal was not given until after his death. That also was the period assigned by the testatrix for the distribution of their proportions of the fund, among such of the legatees as were then of the age of twenty-one, and from which the division of the interest was to be made with reference to those who had not attained that age. I think, therefore, that those only of the legatees, who were living at the death of *William Pope*, are entitled to share this property; and that such was the intention of the testatrix. Those persons are *Arthur* and *Sarah Groombridge*.

With respect to the petitioners, *Lowe* and *Goujon*, who claim the share of *Sarah Groombridge* under the assignment contained in the trust-deed of 1816, I think their claim cannot be sustained. I think her share did not pass either under the particular or the general words contained in that instrument. The petitioners, *Arthur* and *Sarah Groombridge*, must therefore take the property in question in moieties.

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In the Matter of FORTESCUE.

Surplus stock, arising from sales under the acts for the redemption of the land-tax, will be ordered to be transferred to the party, who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee.

CERTAIN real estates had been devised, after some previous limitations, to the first son of the body of *William Fortescue* who should attain the age of twenty-one years, his heirs and assigns. The previous limitations had been exhausted; and *John Faithful Fortescue*, the first son of *William Fortescue*, who attained twenty-one, was now entitled in possession to the estates in fee.

Under the acts for the redemption of the land-tax, a part of the lands had been sold for the purpose of redeeming the land-tax on other parts of the devised estates; and, after transferring, out of the purchase-mones, a sufficient amount of stock to the commissioners for the reduction of the national debt, and paying the costs, there remained a surplus of 1686*l.* 12*s.* 1*d.*, three per cent. consolidated bank annuities, standing in the name of the accountant-general. (*a*)

John

(*a*) The 42 G. 3. c. 116.; see sections 98, 99, 100. The latter section provides, that the surplus stock, arising from sales under the act, shall be placed in the name of the accountant-general of the Court of Chancery, "to the intent that such surplus stock may at a convenient time be sold, and the money arising therefrom applied, under the direction and with the approbation of the said court (to be signified by an order made upon a petition to be preferred in a summary way), in the discharge of any debt or debts, or parts thereof, affecting the manors, messuages, lands, tenements, or hereditaments, the land-tax charged whereon shall have been so redeemed; or where the same shall not be so applied, then the same shall be laid out and invested, under the like direction and approbation, in the purchase of other manors, messuages, lands, tenements, and hereditaments, which

John Faithful Fortescue presented a petition, praying that the stock might be transferred to him.

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When the petition came on, a doubt was entertained, whether, under the words of the act, the Court could make any other order than that the stock should be sold, and the money laid out in the purchase of lands: the 100th section of the 42 G. 3. c. 116. providing, that, where there should be a surplus of stock produced by the sale of lands in *England* for the redemption of the land-tax, it should be invested in the name of the accountant-general, and applied by order of the Court in discharge of debts affecting the lands of which the land-tax had been redeemed, or in the purchase of other lands, to be conveyed to the same uses to which the lands, that were sold, stood limited, or such of them as should be existing at the time of making the conveyance.

Mr. Wray, for the petition.

In the present case, if the words of the act were pursued literally, lands would be purchased, and would be conveyed to the petitioner in fee. Under such circumstances, he has a right to have the stock transferred to him, without the circuitry of the purchase of land.

The

which shall be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner, as the manors, messuages, lands, tenements, and hereditaments, which shall be so sold, mortgaged, or charged as aforesaid, stood settled and limited, or such of them as, at the time of making such conveyance and settlement, shall be existing undetermined and capable of taking effect; and, in the mean time, the dividends and annual produce of such surplus stock shall, from time to time, go and belong to the person or persons who would for the time being have been entitled to the rents and profits of the said manors, messuages, lands, tenements, and hereditaments, in case such last-mentioned purchase and settlement were made."

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The Master of the Rolls was of opinion, that, if the petitioner would have been entitled in fee to lands purchased with the stock, the Court had jurisdiction, under the words of the act, to order the stock to be transferred to him; and a reference was directed to the Master, to inquire, whether there were any incumbrances on the fund, and whether the petitioner was entitled to it.

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GILLESPIE v. ALEXANDER.

In a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the Master subsequently reported a debt to be due to him; but, in the mean time, the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees: Held, that the creditor was entitled to receive out of the funds of the legatees so remaining in court, not the whole of the debt, but only a part of it, bearing the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will.

IN this suit, which was instituted for the administration of General *Gillespie's* estate, the original decree, made on the 15th of *November* 1820, directed, among other things, the usual accounts of his assets, and of his debts and legacies. On the 23d of *March* 1823, the Master made his report; in which he certified, that several creditors had come in before him and proved their debts, amounting in the whole to 269*l.* 19*s.* 2*d.* By an order, made on the 15th of *April* 1823, directions were given for paying the debts reported due; and they were accordingly paid. The decree on further directions, made on the 12th of *January* 1825, after ascertaining the rights of the parties, providing for the payment of the costs, and reciting that the creditors of the testator had been paid their respective debts set forth in the schedule to the Master's report, ordered, that the residue of the fund in Court, and also the bank annuities which should be purchased in pursuance of the directions therein contained, should be apportioned among

among the legatees and the annuitants, except such of them whose legacies might appear to have been paid; and such apportionments, when appropriated in the manner therein directed, were to be considered as in discharge of the several legacies, so far as the value of such apportionments should extend. There was also a direction, that the executors should be allowed the sums which they had paid in discharge of legacies.


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In *November* 1825, *Alexander Lean*, claiming to be a creditor of General *Gillespie*, petitioned to be at liberty to go in and prove his debt; and that so much of a sum of 14,177*l.* 16*s.* 9*d.* three per cent. bank annuities, then standing in the name of the accountant-general, to the credit of the cause, as might be sufficient to raise the sum which should be reported due to him, might be sold for payment of his demand. On the 29th of *November* 1825, an order was made, that he should be at liberty to go in and prove such debt, he paying the costs of the petition and of the proceedings before the Master. On the 26th of *July* 1826, the Master reported that 1636*l.* 1*s.* 5*d.* was due to the petitioner from the estate of General *Gillespie*.

In the mean time, about *December* 1825, the fund in Court had been apportioned by the Master among the annuitant and the unsatisfied legatees; and part of it was paid out in discharge of some of the legacies. A few of the legacies had been paid long before (a); and those payments, though not made under the authority of the Court, had been directed to be allowed to the executor by the decree of *January* 1825.

Lean

(a) This fact did not appear Master of the Rolls; but it was on the petition presented to the stated in the petition of appeal:

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Lean then presented a petition, stating, that, pending his proceedings in the Master's office, the parties had proceeded to make the apportionment under the decree on further directions; and that there were standing to the credit of this cause the following sums of three per cent. consolidated bank annuities:—

To the Plaintiff, the annuitant's account	£5045	18	4
To <i>Selina Gillespie's</i> account	-	-	4863 10 8
To the account of the two children by			
the <i>Malay</i> girls	-	-	426 12 10
<i>Four</i> and <i>Leary's</i> account	-	-	90 3 6
			<hr/>
Total	-	£10,426	5 4
			<hr/>


The prayer was, that the report might be confirmed; that the Master might be ordered to apportion to *Lean* as much of the several sums, standing in the name of the accountant-general to these several accounts, as should be sufficient to satisfy his debt of 1636*l.* 1*s.* 5*d.*; and that the accountant-general might be directed to sell so much of the bank annuities so apportioned, as would be sufficient to pay the demand.

All these sums, except that carried to the annuitant's account, had been kept in Court by reason of the infancy of the persons entitled to them, or their residence in a foreign country.

Mr. *Tinney*, in opposition to the petition.

The effect of the application is, to throw upon the annuitant and three legatees the whole of a debt, which should be borne by all the legatees equally. The creditor has no claim to indulgence, for he did not come in under the decree in due time. The apportionment was made, and legacies were paid, after he had presented his
 petition;

petition; and, if he meant to assert a right to render each and every part of the fund in Court liable to the whole of his demand, he ought to have taken care that no portion of it was paid out in the mean time. It is only from accidental circumstances that these particular sums still remain in the name of the accountant-general; but, by being carried to the separate account of the persons entitled to them, they belong as completely to those persons as if they had been actually paid to them.

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Mr. Pemberton, contra.

Every sum, which is part of the assets, so long as it remains in court, must answer the claims of the creditor; and if any legatee is by this means disappointed, while other legatees have been fully satisfied, he must seek his remedy against them. Before the apportionment was made, the creditor's petition was presented; and, as the executors and legatees had thereby notice of his claim, it was their business, not his, to take care that nothing should be done by any of them, which might operate to the prejudice of others among them.

The MASTER of the ROLLS.

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It is said, it was the duty of the creditor to have applied to the Court, in order to prevent any of the legacies from being paid, till his demand was satisfied; but I do not see why the *onus* of protecting the fund should be thrown on him. He is entitled to have his debt paid; and it must be apportioned among the funds of the different legatees, whose legacies still remain in court. Those legatees are not without their remedy: they can call on the other legatees to contribute.

The order of the Master of the Rolls confirmed the report, and directed the debt to be apportioned among

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the four sums of stock remaining in court, and to be paid by the proceeds of a proportionable part of each of the four sums.

From this order the infant, *Selina Gillespie*, appealed.

The petition stated, that there was still considerable outstanding personal estate of the testator, which was in the course of being gotten in; and it insisted, that *Lean* ought not to receive any part of his debt out of the four sums carried over to particular accounts, but only out of any outstanding estate which might be gotten in; that, at all events, it was unjust to throw the whole of the debt upon persons, whose funds, though definitively appropriated to them, had, from accidental circumstances, remained in court; and that the funds so appropriated, if chargeable at all, ought to be charged only with a proportion of the debt, according to the ratio which those funds bore to all the annuities and legacies bequeathed by the testator. The prayer was, that the order of the Master of the Rolls might be reversed; that *Lean* might not receive any part of his debt out of the appropriated funds set apart for *Selina Gillespie*; that, at any rate, the whole of the debt might not be paid out of the four sums set apart for *Selina Gillespie*, the annuitant, the two children by the *Malay* girls, and *Four* and *Leary*, but only such part thereof as should be just, regard being had to the proportion which that annuity, and those three legacies, bore to the other legacies bequeathed by the testator; and if any part of the sum apportioned in respect of *Selina Gillespie's* legacy should be paid to the creditor, then that provision might be made for making the same good to her, out of any outstanding or future personal estate of the testator, which might be gotten in.

Mr.

Mr. *Hart* and Mr. *Tinney*, for the Appellant.

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The original decree precludes all creditors, who do not come in under it, from the benefit of the administration of the assets in this court; and, though a creditor may obtain special leave in later stages of the proceedings, to come in at his own expence, he will not be permitted to undo any thing that has been done. He cannot interfere with payments which have been made — with a distribution which has actually taken place; he can look for the satisfaction of his claim only to an unappropriated residue, or to assets which may be collected in future. Here there is outstanding personal property to a considerable amount, so that he will suffer no detriment. Could he call back the money from the legatees who have been paid? If he can, why does he not do so? Why does he throw the whole burden on four legatees? If he cannot, upon what principle can he interfere with the funds in court? For those funds, though nominally in court, are, in law, the property of individual legatees. The Court holds them, not for the purpose of administration (as to them the business of administration is over), but as a trustee for the persons to whose accounts they are respectively carried. If the Plaintiff had not been an infant, her legacy would have been paid out long since. Is her infancy, which induces the Court to retain her money under its own protection, to expose her to a demand which could not otherwise be brought against her?

At all events, the laches of the creditor must not be permitted to injure individual legatees. If he had come in before the apportionment, the burden would have been born by the whole fund in court, and only a proportion of it would have fallen to the share of these four legatees. He cannot now take more than that proportion of the sums allotted to them.

K 4

Mr.

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GILLESPIE

v.

ALEXANDER.

Mr. Heald and Mr. Pemberton, contrd.

The right of the creditor cannot be varied by the circumstance of there being outstanding personal estate: he is not to wait for those future assets, when there is a fund in court. It is unreasonable to resist what he asks, since his right is higher than that of the legatees; and there is, according to their own allegations, an available fund, out of which they may secure to themselves compensation for any temporary or apparent loss, to which his assertion of his right may expose them. Neither is the creditor's right affected by the apportionment and the payments, which have been made since he presented his petition. It was the duty of others to take care, that nothing should be done, which might render the enforcement of his demand more injurious to some of the legatees than to others; but, so far as he is concerned, the whole suit must be regarded as in the very situation in which his petition found it. He is entitled to fix upon assets of the testator, wherever he can find them; and if he takes more from one legatee than from others, the question of their mutual equities is one about which he needs not to trouble himself.

The LORD CHANCELLOR.

Although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so;

so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

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The present case is involved in much singularity. Previously to *January* 1825, several of the legacies had been paid by the executor; and the order of *January* 1825 is a judgment of the Court in favour of the executor, with respect to these payments; — a judgment which sanctions them upon the ground of there being a report that all the creditors had come in and were paid. The executor being thus indemnified as to these legacies, there were left in court certain funds, which were directed to be appropriated to legatees who had not been paid. In the following *November* the creditor makes his application: the Court thinks proper to allow him to go in and prove his debt; and that order stands unreversed. In *December* 1825, the Master makes his report, and appropriates the fund in court among a number of individual legatees. Now, when the creditor made his first application, it would have been well if the real state of the case had been disclosed to the Court. The question would then have been, whether a creditor, so coming in, was to be paid his debt by three or four legatees, while the other legatees had received their legacies in full; or whether the rule of the Court was not, that he should take from the unpaid legatees such a proportion only of his debt as would have been borne by those three or four legatees, if he had applied before the other legacies were paid, and that he should be left to recover the residue of it by what means he best might. In short, the question is, on whom, under such circumstances, does the burden lie, of enforcing contribution against the other legatees?

Lord *Eldon* had not delivered a final judgment, when he resigned the great seal; but, after he quitted office, the parties

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parties having consented to be bound by his opinion, he gave the following decision : —

“ My memory does not furnish me with the recollection of any case alike to this. It may, therefore, not be improper that this should be brought before the Court again, and spoken to by counsel; after they have endeavoured to find a precedent or precedents for such an order as that complained of.

“ If no precedent to the contrary — that is, no precedent in support of the order — can be cited, I am of opinion, that, — although, if the fund carried to the account of a legatee was residue, after the payment of debts and legacies, the creditor would be entitled to be wholly paid, — yet, if adult legatees are paid, and, on the other hand, legatees, who are infants or have only partial interests, are not paid, but have funds carried to their account, such last-mentioned legatees ought to be considered, as between themselves and a creditor not coming in sooner, as not liable to pay him wholly out of what is so carried to their account, but only to pay him a due proportion of the debt; and that he must seek the payment of the rest of his debt, in proper proportions, against those who have been actually paid. I think, therefore, this order must be altered, and the creditor take only such a proportion; leaving the creditor at liberty to apply, as he shall be advised, against other legatees paid, and against funds which may yet come in; and leaving these petitioners also at liberty to apply, as they may be advised, against funds which may yet come in.

“ If a precedent can be found to the contrary, that precedent must support the order as made.”

The minutes of the order declared, that *Alexander Lean* was not entitled, as against the Plaintiff, the annuitant, and the legatees, — in respect of whose annuities and legacies the several sums of bank annuities had been carried over, as in the petition of appeal mentioned, — to be paid the whole of his debt and interest proved before the Master, but only such proportion thereof as the value of the annuity, and the amount of such legacies, bore to the amount of the other legacies bequeathed by the testator's will, which had been paid. It was referred to the Master to ascertain the contributive portion of the debt and interest, which ought to be paid out of each of the four sums of Bank 3 per cent. annuities, standing in the name of the accountant-general, to the four several accounts before mentioned: directions were then given for raising out of the sums standing to each account its contributive proportion of the debt: and it was ordered, that *Alexander Lean* should be at liberty to apply to the Court, as he might be advised, against such of the legatees as had received payment on account or in satisfaction of their respective legacies; and that he and the annuitant and legatees, in respect of whose annuity and legacies the aforesaid four several sums had been carried over, should be at liberty to apply to this Court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.

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1826.

November 30.

CHARGE v. GOODYER.

Under a bequest of a residuary fund to the testator's first and second cousins, and the children of his kinsman *Geo. Charge*, which children were first cousins of the testator, twice removed, all persons related to the testator in the degree of second cousins are entitled.

JOHN GOODYER bequeathed and devised the residue of his personal estate, and the money to arise from the sale of his real estates, to trustees and executors upon trust, "to pay and divide the same between and amongst all and every his first and second cousins, and the children of his late kinsman *George Charge*, share and share alike."


George Charge had two children, who were first cousins, twice removed, of the testator, being the great grandchildren of his uncle.

It was admitted, that the bequest to first and second cousins, had it stood unmodified by any circumstance or expression, would have included all persons of the degree of second cousins; that is, first cousins once removed, and first cousins twice removed. *Mayott v. Mayott.* (a) *Silcox v. Bell.* (b) But Mr. *Tinney* contended, that here the legal construction of the words was controlled by the specific mention of the children of *George Charge*. Had the testator meant by first and second cousins, not merely such persons as were, in strict propriety of speech, first and second cousins, but all persons within or of the degree of second cousins, it would have been unnecessary for him to have added, "and the children of my late kinsman *George Charge*;" for these children would have been included in the preceding

(a) 2 Bro. C. C. 125.

(b) 1 Sim. & Stu. 301.

ceding general words. There was an indication, therefore, that he did not mean to include in the description of "second cousins" first cousins twice removed.

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Mr. *Sugden*, *contra*, argued that the legal construction of the words could not be restricted by any inference drawn from the mention of the children of *George Charge*; since there was nothing to shew, that the testator knew that these children were within the degree of second cousins.

The MASTER of the ROLLS was of that opinion; and made a declaration, that all persons of the degree of second cousins were entitled to the benefit of the bequest.

1826.

December 1.

Between the SOCIETY for the PROPAGATION of
the GOSPEL in Foreign Parts, Plaintiffs;

AND

His Majesty's ATTORNEY-GENERAL, Defendant

A fund given
to a corpora-
tion in *Eng-
land* for a
charitable
purpose, or-
dered to be
paid to the
corporation,
without the
settlement of
a scheme.

ARCHBISHOP *Tennison*, by a codicil to his will, dated the 2d of *September* 1715, after mentioning the "Society for the Propagation of the Gospel in Foreign Parts," bequeathed as follows: — "My present will is, that my executors, or their administrator or assigns, do well and truly pay to the said society within one month, or two at the furthest, after the appointment and consecration by lawful authority of two Protestant bishops, — one for the continent, another for the isles in *North America*, — the sum of 1000*l.* to be applied in equal portions to the settlement of such bishops in the before-mentioned sees In the mean time, until such appointment and consecration as aforesaid are completed, my will is, that my executors do not pay the said 1000*l.*, or any part or portions of it, or any interest for the whole or any part of it, to the said society; but, as they have opportunity, to put out the said sum, or part of it, to interest upon some public funds, and to apply such interest to the benefit of such missionaries, being *Englishmen* and of the province of *Canterbury*, as they shall find upon good information to have taken true pains in the respective places which have been committed by the said society to their care in the said foreign plantations, and have been, by unavoidable accidents, sickness, or other infirmities of the body, or old age, disabled from the

per

performance of their duties in the said places or precincts, and forced to return to *England*."

A decree, made in *February* 1717, in a suit to which the "Society for the Propagation of the Gospel in Foreign Parts" was a Defendant, directed the 1000*l.* to be laid out on such securities as the Master should approve, and the interest of it to be paid, according to the directions of the testator, until one month after the appointment and consecration of two such bishops as were mentioned in the will; and when two such bishops were consecrated, the Court was to give further directions for applying the interest from time to time as there should be occasion.

The 1000*l.* was accordingly invested in government securities, in the name of the accountant-general; and it had been augmented, by the accumulation of unapplied dividends, to a sum of 9410*l.* 15*s.* 10*d.* consolidated 3 per cent. bank annuities, and 750*l.* 3 per cent. reduced bank annuities, besides a considerable sum in cash. There had long been a Bishop of *Quebec*, and a Bishop of *Nova Scotia*. In 1824 two bishops were appointed,—one to the see of *Jamaica*, and the other to the see of *Barbadoes*;—and both had been duly consecrated. The society insisted, that, upon that event, they became entitled to the Archbishop's bequest, and filed a bill to have the stock transferred to them. The Attorney-General was the only Defendant.

Mr. *Sidebottom*, for the Plaintiffs.

Mr. *Wray*, for the Attorney-General.

As this is a portion of the assets of the testator, which is to be applied according to the directions of his will,
his

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his personal representatives ought to be before the Court: — at all events, the Court will not part with the fund. The society, however respectable, is in the same situation as any other legatee in trust for a charity. The Court, having possession of the fund, will settle a scheme for its administration; and it will be the duty of the Master, in settling that scheme, to consider, with what degree of discretionary control it may be fit to entrust the society.

The MASTER of the ROLLS.

The sum is much larger than the testator intended that the society should administer. However, he has reposed confidence in them; and, therefore, let the fund be transferred to them.

1826.

WILKINSON v. CHAPMAN.

November 30.

BENJAMIN PATMAN by his will, dated on the 10th of *November* 1786, bequeathed to his wife *Mary* a yearly rent-charge of 12*l.*, "to be issuing out of all his real estate, lands, tenements, and hereditaments in *Pinchbeck*;" and, for the purpose of securing the due payment of the annuity, he gave her the usual powers of distress and entry. The remainder of the will was in the following words:—

"I give and devise unto my dear daughter *Mary*, all my said estate, lands, tenements, and hereditaments, to hold the same to my said daughter *Mary*, her heirs and assigns for ever, subject and without prejudice to the said annuity for the life of my said wife, and to the remedies for recovering the same; but in case my said daughter shall happen to die under the age of twenty-one years, and without lawful issue, then I give and devise all my said estate, lands, tenements, and hereditaments unto my said wife, for and during the term of her natural life; and, after her decease, I give and devise all my said estate, lands, tenements, and hereditaments unto all the children of *John Hipworth*, late of *Walcott*, in the said county, to be equally divided amongst them, share and share alike, as tenants in common."

The testator died a few days after the date of the will, leaving his wife, his daughter, and five children of *John Hipworth* him surviving. In *March* 1788, the daughter died in her childhood, and without issue. The widow died in *June* 1824.

A testator, after giving his wife an annuity for her life, to be issuing out of "all his real estate, lands, and hereditaments in *P.*," devised "the said estate, lands, and hereditaments" to his daughter and her heirs; but in case his daughter died under twenty-one, and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and after her decease, to the children of *A.*, share and share alike: Held, that, subject to the previous interests given to the daughter and to the wife, the children of *A.*, living at the testator's death, took an estate in fee in the lands in *P.*

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The plaintiffs, claiming under the devise to the children of *John Hipworth*, filed their bill for the specific performance of a contract, which was entered into after the widow's death, for the sale of the devised lands. The purchaser was willing to perform the contract, provided the Court was of opinion that the fee was in the vendors.

The only question in the cause was, Whether the fee of the lands in *Pinchbeck* passed, under the devise in the will of *Benjamin Patman*, to the children of *John Hipworth*, subject to the previous interests given to his daughter and his widow?

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Dec. 2

Mr. *Shadwell* and Mr. *J. Martin*, for the Plaintiff, argued, that, though the gift was only to the children of *John Hipworth*, without the addition of words of limitation, yet the word *estate*, which was used to express the subject of the devise, would give them the fee.

Mr. *Preston*, for the Defendant, argued, that the words "my real estate, lands, tenements, and hereditaments in *Pinchbeck*," were merely descriptive of the property which was devised, and did not denote the quantity of interest which was meant to pass by the will.

The following cases were cited:—*Goodwyn v. Goodwyn* (a), *Pettiwarde v. Prescott* (b), *Child v. Wright* (c), *Harding v. Gardner* (d), *Bruce v. Bainbridge*. (e)

1825.
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Lord Gifford, MASTER of the ROLLS.

Whatever might have been the opinion of the Court, had the

(a) 1 *Ves.* sen. 226.

(b) 7 *Ves.* 541.

(c) 7 *East*, 259.

(d) 1 *Brod. & Bing.* 72.

(e) 2 *Brod. & Bing.* 123.

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the case been new, the authorities have clearly established that the word *estate*, — unaccompanied by any other expression indicating that, in using it, a testator meant to denote the locality of the property, and not quantum of interest, — will pass the fee; and, even where the words have been “all my estate in or at *A.*,” the fee has been held to pass. On the other hand, where it appears by the context that the testator, in using the word *estate*, meant not to convey quantum of interest, but to point out a description of the property, there the word *estate* will not *ex vi termini* pass the fee.

In one respect this case differs from all which I have been able to refer to. The difference is this: that the testator has used the word “estate” in all the devises; but, where he meant to give a fee (as in the devise to the daughter), he has added the words of limitation “heirs and assigns;” and where he meant to give only an estate for life (as in the devise to the widow), he has restricted the gift by express words. Where he bequeaths the annuity to his wife, to be issuing out of his real estate, the phrase *estate* must have meant the same thing as lands. Where he gives all his said *estate* to his daughter and her heirs, the addition of words, descriptive of the quantity of interest which he meant her to take, seems to intimate, that he did not contemplate that the whole fee would pass by the word *estate*. In the next devise, he gives all his said *estate* to his wife; but he did not there mean that these terms should pass the fee, for he expressly restricts her to a life-interest.

Notwithstanding this peculiarity, the inclination of my opinion is, that the words are sufficient to carry a fee to the children of *John Hipworth*: but the question is of such a kind, that I will not compel a purchaser to take the title.

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The purchaser consented that a case should be directed for the opinion of the Judges of the Court of King's Bench.

A case was accordingly directed. It was argued before *Abbott*, Lord Chief Justice, and *Bayley* and *Holroyd*, Justices; and they certified — “that the children of *John Hipworth*, who were living at the time of the death of the testator, *Benjamin Patman*, took an estate in fee in the estate, lands, tenements, and hereditaments of the testator in *Pinchbeck*, as tenants in common, under and by virtue of his will.”

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The cause came on upon the equity reserved; when the *Master of the Rolls* confirmed the certificate, and made a decree for specific performance.

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BARTLETT v. GILLARD.

November 25.

1827.

February 21.

October 30.

MARY GILLARD, by a codicil to her will, bequeathed certain leasehold property to her son *Richard Gillard*, his executors, administrators, and assigns, “during so many years of her,” the testatrix’s, “term therein as should run out in the lifetime of her daughter *A. M. Bartlett*, subject to the yearly sum of 12*l.*, for the sole use of her daughter *A. M. Bartlett*, to be paid to her half-yearly.”

A testatrix devises leaseholds to *A.*, subject to the yearly sum of 12*l.*, for the sole use of Mrs. *B.*, to be paid her half-yearly, and this annuity was payable on the 27th of *January* and 27th of *July*; many years afterwards, *A.* devises to *R.* all his lands (in which these leaseholds were included), paying Mrs. *B.* 12*l.* per annum, by half-yearly payments, to be made on the 27th of *January* and the 27th of *July*. Mrs. *B.* is entitled, under the annuity given

The testatrix died on the 27th of *January* 1793. *Richard Gillard*, on her death, entered into possession of the rents and profits of the estate, and continued in possession of them till his death in 1819. It was alleged, that, from the death of *Mary Gillard*, no payment had been made in respect of this annuity till *January* 1817; from which time the payments were regularly made, and had been received without prejudice to the claim for the arrears.

Richard Gillard, shortly before his death, made his will, containing a clause in the following words :—“ Lastly, I do

A.’s will, to a second annuity, distinct from, and in addition to, the annuity given her by the will of the testatrix.

An annuity given to the separate use of the wife is discharged by payments made to the use of her husband and sums allowed him in account; the circumstances of the transactions being such as to satisfy the Court, that the mode of dealing between the person who was bound to pay the annuity and the husband was with the acquiescence of the wife, or with her authority, either express or implied.

Where a passage read by a Plaintiff from an answer refers to another passage, that other passage is to be read only for the purpose of explaining or qualifying the thing in respect of which the reference is made, and not for the purpose of introducing new facts, which do not explain or qualify that thing, though such new facts be connected, in grammatical construction, with that which must be read.

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do make, constitute, and appoint *R. Gillard* my whole and sole executor of all my land for ever, and leasehold property here or at *Beeston*, or money that shall become due for the same, paying *Maria Bartlett* 12*l.* per annum by half-yearly payments; viz. the 27th of *January* and the 27th of *July*, and my sister, *Elizabeth Gillard*, 20*l.*”

The bill was filed by Mrs. *Bartlett* and her husband, for payment of the arrears of the annuity bequeathed to her by *Mary Gillard*, and of the arrears of a second annuity of 12*l.*, distinct from the former, which she claimed under the above mentioned clause in the will of *Richard Gillard*.

It was stated by the answer, that, from 1793 to 1817, the annuity had been satisfied by payments made to *William Bartlett*, with the privity and consent of his wife; that, in 1817, the Plaintiffs, pretending that the payments made to the husband could not be a satisfaction of a bequest to the separate use of the wife, distrained on the premises for the alleged arrears; that the distress was replevied; and that no further proceedings were taken to enforce payment.

The will of *Richard Gillard* did not, it was insisted, create a further charge of 12*l.*, but merely devised the property subject to the previously existing charge.

It was proved, that, between 1793 and 1817, *Richard Gillard* paid various sums to *William Bartlett*, and allowed him sums in account between them, so that *William Bartlett* was *Richard Gillard's* debtor to a considerable amount. Among the sums so allowed to *Bartlett*, was nine years interest on a mortgage for 300*l.*; and a witness, *Mary Gillard*, proved that she had heard *William Bartlett* and his wife say, that the interest had
been

been set off against the accruing payments of the annuity, with the privity of both of them. It was also proved, that, about *December* 1816, Mrs. *Bartlett* wrote to her brother *Richard Gillard*, requesting him, as a favour, to accept a bill of 40*l.* for the accommodation of her husband. The *Bartletts* had long been in needy circumstances, and the husband had latterly become insolvent.

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Mr. *Horne* and Mr. *Barber*, for the Plaintiffs.

I. There might have been some difficulty, if *Gillard* had paid the annuity to the husband as it became due; such a payment might, under some circumstances, have been good against the wife. But the case of the Defendant is simply this: — “There is an account between me and *Bartlett*, in which he is debited with large sums — on one occasion, with 49*l.* — on another, with 121*l.* — on another, with 105*l.*; the most of these items of debit are not for monies actually paid to him, but for bills which I accepted for him, or for interest which I allowed him to retain; in respect of these transactions, he is largely my debtor; and against this demand I set off the annuity for twenty-four and a half years.” The first item, which is claimed against *Bartlett*, is for a note of hand dated in *June* 1801: what connection could such a transaction have with the payments which ought to have been made in respect of the annuity, during the preceding eight years? The question, therefore, is, — Can the wife’s claim for an annuity, given to her separate use, be repelled, by shewing that her debtor is the husband’s creditor to an equal or greater amount? Even if it could be shewn, that on particular occasions she authorized her debtor to make advances to her husband, on the faith of her annuity, the Defendant could discharge himself only *pro tanto* from her claim; and the utmost, that he could have a right to, would be an inquiry, — whether he has made any, and what,

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payments, with her authority. There is no attempt to prove that she ever agreed that her annuity should be paid to her husband; much less, that it should be satisfied by being set off against her husband's debt. The length of time which has elapsed occasions no difficulty: *Stackhouse v. Barnston* (a), *Aston v. Aston* (b), *Forster v. Forster*. (c)

II. *Richard Gillard* has devised the leasehold which he derived from *Mary Gillard*, and also other estates, "paying *Maria Bartlett* 12*l.* per annum." This creates a charge upon the property, and it is a charge totally distinct from, and independent of, the annuity bequeathed by *Mary Gillard*. It affects other property besides the leasehold charged by *Mary Gillard*, and it is not, like the former annuity, given to *Mrs. Bartlett's* separate use. The testator does not make the least allusion to the former annuity, or to the will under which it arose. The will of *Richard Gillard* came before the court of King's Bench in *Doe v. Gillard* (d), and the court expressed an opinion that it charged his lands with an annuity to *Mrs. Bartlett*. "In the conclusion, also, of his will," said the Chief Justice (e), "and immediately after the clause containing the gift to the executor, come the following words: 'paying to M. *Bartlett* an annuity of 12*l.*, and to my sister *Elizabeth* an annuity of 20*l.*;' whereby the gift to the executor becomes chargeable with those annuities, and must, therefore, have been intended as a fund for the payment of them."

Mr. *Sugden* and Mr. *Teed*, for the Defendant.

I. *Mrs. Bartlett* was living with her husband, and, though

(a) 10 *Ves.* 469.

(b) 1 *Ves.* 264.

(c) 2 *Vern.* 386.

(d) 5 *B. & A.* 785.

(e) 5 *B. & A.* 788.

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though in necessitous circumstances, does not for twenty-four years set up any claim to arrears of her annuity. *Primâ facie* the presumption is, that it was satisfied; and that presumption is rendered irresistible by the proof which the Defendant has given of her being privy to the advances which he made to Mr. *Bartlett*, and of her positive acquiescence in the arrangements, by which the interest of the mortgage, due from her husband, was to be satisfied out of the instalments of her annuity.

II. The will of *Richard Gillard* does not give a second annuity to Mrs. *Bartlett*. The testator was devising to his nephew certain property, part of which was subject to an annuity of 12*l.*, payable to *Maria Bartlett* by half-yearly payments, on the 27th of *January* and the 27th of *July*. This annuity the devisee would have to pay; and the testator therefore adds, "paying *Maria Bartlett* 12*l.* per annum, by half-yearly payments; viz., the 27th of *January* and the 27th of *July*." The question is, Whether are these words descriptive of the previous charge, or do they create an additional annuity? In the sum specified, the days of payment, the person to whom it is to be paid, they accord exactly with the annuity given by *Mary Gillard*; and there are no words of express gift. In form, the expression is rather descriptive of a prior charge, than fitted to create a new charge; and the probability of that construction is greatly increased by the exact coincidence between the particulars of the payment here mentioned and the particulars of the annuity bequeathed by *Mary Gillard*.

The Court of King's Bench could not express any opinion upon the question; for they had not before them the will of *Mary Gillard*, nor the facts on which the question arises.

III. If

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III. If the Plaintiff has a right to both the rent-charges or to the arrears, she can try the point by distraining. The question is entirely legal; and this Court has no jurisdiction.

Mr. *Russell*, for formal parties.

October 30.

The LORD CHANCELLOR.

The first question in this case related to the arrears of the annuity of 12*l.*, bequeathed by *Mary Gillard* to *Anna Maria Bartlett*, and which were claimed from 1793, when the annuity first became payable, to the year 1817; since which, the annuity had been regularly paid. It was supposed, that, during the whole of this long interval of twenty-four years, these payments had been entirely omitted. It is not very probable that this should have been the case; particularly, considering the manner in which the annuity was secured, unless the claim were satisfied in some other way with the consent of Mrs. *Bartlett*. The Plaintiff, *William Bartlett*, does not seem to have been in such circumstances, as to have rendered the payment of this annuity a matter of indifference to his wife. It was proved, that accounts subsisted between *William Bartlett*, the Plaintiff, and the testator, and that the latter accepted from time to time bills drawn by the former. It appeared, too, by the testimony of *Mary Gillard*, that, as to one demand, *Anna Maria Bartlett* expressly consented that the annuity should be set off against the claims of *Richard Gillard* upon *William Bartlett*, viz., with respect to the interest from time to time payable upon a mortgage. These circumstances, — connected with the letter of *A. M. Bartlett* to *Richard Gillard*, which was read in the cause, and in which she requests him to be so good as to accept a bill (obviously as a matter of accom-

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accommodation and favour); observing, “that it was only a matter of form, that it was not to be paid under four months, and that he, *Richard Gillard*, might depend on the money being paid by that time” — satisfy me, that the payments in respect of the annuity were, with the acquiescence and consent of Mrs. *Bartlett*, taken in account between *Richard Gillard* and her husband, and that nothing was due at the time when the letter was written. She might, if she thought proper, permit the annuity to be paid to her husband; or, if money were advanced by *Richard Gillard* from time to time to her husband, — either by accepting bills for his accommodation, or otherwise, — she might allow it to be taken in account between them, which would be equivalent to payment; and her consent and acquiescence would in such case be binding upon her. *Smith v. Camelford* (a), *Milnes v. Busk* (b), *Powell v. Hankey*. (c)

The terms of the letter, to which I have referred, are quite inconsistent with the supposition, that *Richard Gillard* was at that time a debtor to either of the Plaintiffs. As to the date of this letter, the testimony of *Mary Gillard*, coupled with the production of the bill to which her evidence and the letter related, prove it to have been in *December* 1816. The bill was accepted, and afterwards paid, by *Richard Gillard* the testator.

I think, therefore, upon this evidence, that nothing was due in respect of the arrears of the annuity granted by the testatrix.

The next question is, Whether the annuity given by the will of *Richard Gillard* is to be taken as a substitution for the former annuity, payable to the separate use

(a) 2 Ves. 716.

(b) 2 Ves. 488.

(c) 2 P. Wms. 82.

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use of *A. M. Bartlett*? The facts, relied upon on the part of the Defendant, are, that the amount of the two annuities and the days of payment are precisely the same. And, if I were to indulge in conjecture, I might possibly come to the conclusion, that the testator had no intention, by the words "paying to *A. M. Bartlett* 12*l.* per annum," to create a new and additional payment. But the second annuity is charged upon the freehold as well as the leasehold property; and, being payable to the wife generally, and not to her separate use, I think the case comes sufficiently within the authorities and doctrine applicable to this subject, to repel the presumption, that the second annuity was intended as a substitution and satisfaction for the first. The consequence is, that both annuities will be payable from the testator's death.

In the course of the hearing, Mr. *Horne* read a passage from the answer, which commenced with the following words, "Before such demand was made," &c. The immediately preceding passage, in which the demand was spoken of, contained statements of several other circumstances, which, in grammatical construction, were connected with the mention made of the demand, so as to be comprised in one sentence.

Mr. *Sugden* argued, that the statements of all these circumstances were to be considered as read, and the statements themselves, as given in evidence by the Plaintiffs.

Mr. *Horne*, *contra*.

The Defendant has a right to have the preceding passage read only for the purpose of elucidating the
passage

passage which was first read ; that is, to identify or qualify the demand. He cannot read the preceding passage for the purpose of introducing allegations which have no connection with the demand, except by the accident of their being found in the same sentence.

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The LORD CHANCELLOR.

Where a Plaintiff chooses to read a passage from a Defendant's answer, he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage, or to a fact stated in any other passage, that other passage must be read also : but it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read, in which the reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced, in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read.

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Dec. 5, 6.

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April 2.

JEFFERYS v. SMITH.

A., being, as a partner, entitled to a share of extensive iron-works, and of the lands and premises on which they were carried on, agreed, for valuable consideration, to assign to *B.* his interest in the property and business: *B.* interfered and acted as a partner; but afterwards he assigned his share, and gave notice to the other partners, that he had withdrawn from the business; and, when called on to complete his purchase, resisted the performance of the contract successfully,

GEORGE STOKES was the owner of the *C* iron-works, consisting of divers freehold, copy and leasehold lands and messuages, with mines of and ironstone, and the engines, machinery, and of an iron-master. This property, which was subject to a mortgage-debt of 49,600*l.*, he divided into eight shares, and, of these shares, he, in 1810, assigned three to *Jefferys*, two to *Stevens*, and one to *Tickell*. A partnership being thus formed for the purpose of carrying on the trade of iron-masters, *Stokes*, *Jefferys*, *Stevens*, and *Tickell* executed a deed, dated the 3d December 1811, which provided, that the partnership should continue for two years from the 24th of June 1810, and should be carried on under the conditions there expressed; that the shares of a partner dying during the continuance of the firm should go to his executors or administrators or to any other person to whom he should have bequeathed them; that each of the partners should be at liberty to sell and assign his interest in the partnership, not being less than one eighth share of the whole; and that none of them should be at liberty to sell a smaller share of the concern, without the consent in writing of his co-partners.

on the ground that a good title could not be shewn: Held,

That *B.*, as between him and the other partners, was to be treated as a partner, and was to contribute to the partnership losses, until the time when he gave notice of his withdrawal from the concern and assigned his share:

That his liability ceased upon his assigning his share, and giving notice to the other partners of his withdrawal from the concern:

That the assignment of his share, though made to an insolvent person, was nevertheless a valid assignment, and was the less effectual in putting an end to his liability:

That the assignee, not having been acknowledged a partner, or permitted to act as such, did not, by his acceptance of the assignment, incur any liability as between himself and the co-partners.

In *March* 1812, *Stokes* was declared a bankrupt; but the business continued to be carried on by his assignees and the three remaining partners. In *August* 1815, *Tickell* assigned his share to *Stevens* and a person of the name of *David Smith*; and, on the same day, *Stevens* assigned to *Smith* one of his original eighth shares.

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In this constitution of the partnership, the business was carried on till *June* 1818. On the 11th of that month, one *Guppy* entered into a written executory agreement with *Stevens* for the purchase of his three sixteenths of the concern; and, on the 19th of *July* 1818, *Guppy* entered into a similar agreement with the assignees of *Stokes* for the purchase of their two eighths. The former agreement, it subsequently appeared, was made by *Guppy* on behalf of himself, *Jefferys*, and one *Spurrier*, in equal shares; the latter, on behalf of himself and *Spurrier*. In each it was stipulated that the interest of the purchaser in the trade should commence from the 28th of the preceding *March*. In *November* 1818, an instrument was executed, assigning to *Guppy* the one sixteenth which *Jefferys* acquired under the agreement of *June* 1818, and declaring that *Guppy* was to have all the benefit and to bear all the loss which might have arisen from it. The firm, after these changes in the partnership, was *Jefferys, Smith, Guppy, and Co.*; and, for a considerable period, *Guppy* and *Spurrier* acted as partners in the trade. Though *Spurrier's* name did not appear in the firm, he interfered in the conduct of the business, was consulted with respect to it, and, as a partner, signed various sets of resolutions.

After some time, it was apparent that the business was carried on at a loss. On the 12th of *January* 1819, *Guppy* agreed to assign his four sixteenths to *Hodgson*; and, by an agreement of the 13th *December* 1819,

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1819, *Hodgson* assigned two of these sixteenth shares to *Thomas Richard Guppy*. On the 14th of *December* 1819, *Samuel Guppy* sent a notice to *Jefferys* that he had assigned his shares, and that, as to him, the partnership was to be at an end; and, at that time, the style of the firm was changed to *John Jefferys and Co.* On the 21st of *December* 1819, *David Smith* assigned his shares to *William Taylor Smith*, and notice of the assignment was immediately given. *Jefferys*, however, refused to recognise *Hodgson*, *Thomas Richard Guppy*, or *William Thomas Smith* as partners, or to permit them to interfere in the concern; and, as the losses were increasing from day to day, he began to take measures for bringing the business to a close. In *March* 1820, the forges and mills ceased to be used; and, in *April*, all the works were stopped.

It turned out that the two executory contracts, of *June* and *July* 1818, could not be carried into execution. By the agreement of the 11th of *June* 1818,* *Stevens* was to make out a good title to his three sixteenth shares, and to execute a conveyance of them on or before the 24th of *June*, 1819. The title being objected to, he, in *June* 1819, filed a bill for specific performance; and a reference being directed by the decree in that suit, the title was found to be bad, and, at the hearing on further directions, the bill was dismissed. *Spurrier* and *Guppy*, on the other hand, instituted a suit to have the contract with *Stokes's* assignees rescinded, and succeeded in their object.

Spurrier, who was a solicitor, did not interfere in the details of the management; but the evidence, though in some points contradictory, proved, on the whole, that he

* See *Stevens v. Guppy*, *infra*.

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he acted as a partner down to the close of the business. In particular, on the 22d of *April* 1820, he sent the following letter to the clerk of the partnership:—"I request that you will cause the accounts of the *Coseley* iron-works to be stated and balanced up to the 25th day of *March* last, and one copy thereof to be sent to me. The quarterly accounts up to Christmas last, either are or ought to have been stated and balanced long since. I request also to be furnished with a copy of all memoranda of resolutions in regard to the management of the *Coseley* iron-works, which have been entered by you or your order in the books of the said company since the 24th of *March* 1818."

The bill was filed in *November* 1821, by *Jefferys*, against *David Smith, Stevens*, the assignees of *Stokes, Samuel Guppy, Spurrier, Hodgson, Thomas Richard Guppy*, and *William Thomas Smith*. It prayed a dissolution of the partnership, an account of the partnership transactions, and various declarations which were necessary in order to ascertain the rights and liabilities of the different persons who had or were alleged to have an interest in the partnership. It charged that the shares had been conveyed to *Hodgson, T. R. Guppy*, and *W. T. Smith*, not *bonâ fide*, but merely for the purpose of relieving *Samuel Guppy* and *David Smith* respectively from partnership liabilities; and in the argument it was not denied that the assignments were made with that view. It was also alleged, and not denied, that *T. R. Guppy* and *W. T. Smith* were needy persons, and that *Hodgson* was not in opulent circumstances. The object of the plaintiff was to compel the Defendants, particularly *Spurrier* and *Samuel Guppy*, to bear their share of the losses which had been incurred.

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The questions principally argued were, first, Whether the acts done by *Spurrier* and *Guppy*, under the executory contracts with *Stevens* and the assignees of *Stokes*, which it ultimately turned out could not be performed, constituted those two gentlemen partners in the concern, as between them and *Jefferys*: Secondly, if *Guppy* and *Spurrier* were partners, at what time did they respectively cease to be clothed with that character? Thirdly, Did *Hodgson*, *T. R. Guppy*, and *R. Smith* incur any liability in respect of the partnership?

Mr. *Shadwell*, Mr. *Roupell*, and Mr. *Cooper*, for the Plaintiff.

Mr. *Sugden* and Mr. *Rolfe*, for *Spurrier*.

Mr. *Horne* and Mr. *Romilly*, for *Samuel Guppy*.

Mr. *Agar* and Mr. *Phillimore*, for *David Smith*.

Mr. *Pepys*, Mr. *Preston*, and Mr. *Lovat*, for other parties.

The Plaintiff contended, that it was a matter of indifference to him, whether *Spurrier* and *Guppy* acquired their interest in the partnership by a perfect or imperfect title. *Stevens* and the assignees of *Stokes* having certain shares, which, by the regulations of the partnership, they were entitled to assign, agreed to transfer them to *Guppy* and *Spurrier*; and, under that agreement, *Guppy* and *Spurrier* entered into possession of the shares, and exercised all the rights of partners: thus by their conduct constituting themselves partners as to *Jefferys* in particular, and as to the world at large, except, perhaps, in so far as any question might be raised between them and their assignors.

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signors. What did it avail, as to the rights of *Jefferys* and other third parties, that the assignors were unable to make a title to the lands and hereditaments, which formed an important part of the partnership property, so that *Stevens* failed in his attempt to enforce the performance of one of the contracts, and the other contract was rescinded? *Spurrier* and *Guppy* might have declined to take possession of the shares, or to act as partners, till a good title was shewn, and till they were assured that the agreement could be completely carried into execution. They did not choose to adopt that course; they interfered as partners, under the executory contracts: they had a right to do so, and *Jefferys* had no right to exclude them: he could not have said, "You shall not be partners, till every question be settled, which can possibly be agitated between you and those from whom you have purchased." Their answer would have been, "It is enough for you, that *Stevens* and the assignees of *Stokes* have entered into an agreement with us, by which we are entitled to be considered the owners of their shares, and that we choose to act as such owners." It is altogether a different question, what the mutual rights may be between *Guppy* and *Spurrier* on the one hand, and the persons with whom they contracted for the shares on the other, as to profit made or loss sustained in the period during which *Guppy* and *Spurrier* acted as partners under the agreements, which, it is now ascertained, cannot be carried into execution.

Spurrier did no act which can be considered as a determination of the partnership; he continued to interfere as a partner, till the works were all stopped. *Guppy's* notice could not free him from subsequent liabilities; for he took no step to have the affairs of the partnership wound up; and it is fantastical to imagine that a large concern, such as this was, can be brought to an end at any given moment. Existing engagements must be fulfilled;

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filled; new engagements must be entered into, in order to bring the business to a close with as little loss as possible. Besides, the original articles (and it is clear that all the parties considered themselves as acting under those articles) stipulated, that the partnership should continue for fourteen years.

The assignments by *Guppy* and *David Smith* could not free them from their liabilities. They were made to persons either insolvent or of no property, and clearly for the purpose of enabling the assignors to get rid of their own responsibilities. Can improper persons be introduced thus fraudulently into a partnership? If the assignments to *Hodgson*, *T. R. Guppy*, and *W. T. Smith* are to exonerate the assignors, then those persons must be liable as partners: if they are not liable, the responsibility must remain with the assignors themselves.

On behalf of *Spurrier* and *Guppy* it was said, that, as the contracts, under which they entered into possession, had fallen to the ground, they were merely trustees for the vendors, who were now to be regarded as having been all along the only persons interested in the shares. The whole of the transaction, which gave them for a time an apparent connection with the partnership, was now as if it had never been. While they had the apparent interest in the concern, they might have been liable to third persons; but, as between themselves and the partners, they were strangers to the concern. It was now certain, that they never had any actual or valid interest in any portion of the partnership property. They could not have claimed any part of the profits, if profits had been made: on what ground, then, could it be said, that they were to be answerable for losses? They had interfered in the partnership; but it was on the faith of contracts, which, they expected, would be carried into execution,


execution, and which it is now admitted are mere nullities. Every act done by them had reference to these contracts; and *Jefferys* well knew in what character they interfered. They interfered as persons who meant to be, and were likely to become, partners. He might unquestionably have excluded them, until the contracts were carried into complete effect; he did not exclude them, because their interference could, in no event, occasion to him disadvantage or inconvenience.

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SMITH.

At the date of the contracts in *June* and *July* 1818, *Stevens* and the assignees of *Stokes* were subject to all the partnership liabilities. They remain liable. In what respect, then, is the situation of the Plaintiff altered for the worse by the transaction with *Spurrier* and *Guppy*? These gentlemen must be considered throughout as merely representing the real owners of the shares: and there is no reason why the Plaintiff should acquire, from their contracts with other persons, rights against them, which those other persons could not enforce. For the purpose of the present suit, the Plaintiff cannot stand in a better situation than *Stevens* and the assignees of *Stokes*.

Stevens and the assignees of *Stokes*, since the contracts of sale are at an end, must be considered as having continued partners; and if they continued partners, how could *Guppy* and *Spurrier* also be partners in respect of the same shares?

The interference of those gentlemen was under the agreement of *June*, 1818: and if they are to be partners, it can be only to the extent of the shares which they were to take under that agreement, namely, each one sixteenth.

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At all events, the partnership, from the time of *Stevens's* bankruptcy, must have been a partnership dissoluble at pleasure; therefore, it was terminated as to *Guppy* by the notice of the 11th Dec. 1819; and being terminated as to one, it must have been at an end as to all, unless a new agreement can be shewn to have been entered into by the remaining partners.

The suit is likewise faulty in form; for the bill asks an account of the transactions of three or four different partnerships.

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The MASTER of the ROLLS.

It has been contended on the part of *Guppy* and *Spurrier*, that they cannot be considered as partners, though they acted as such. To support this view of the case, it is argued that they entered into the contract with *Stevens* on the assumption that he could make out a good title to the property; that a similar understanding existed as to their agreement with the assignees of *Stokes*; and that, no title having been made out, the parties not being in a situation to fulfil the contract, and the transaction being by that means at an end, *Guppy* and *Spurrier* must be considered all along to have been, and to have been acting as, trustees for the persons interested in the property. As between *Guppy* and *Spurrier* on the one hand, and *Stevens* and the assignees of *Stokes* on the other, that might be a good argument; but *Jefferys* has nothing to do with the relative situation in which those parties placed themselves with respect to each other. *Stevens* possessed an interest in the concern; so did the assignees; they entered into arrangements with *Spurrier* and *Guppy*; and in consequence of those arrangements, *Spurrier* and *Guppy* were put in possession of the partnership property, and
 con-

continued in it, acting as partners with *Jefferys*. The necessary consequence is, that *Jefferys* is entitled to consider them as partners liable to him for their proportion of the debts of the partnership.

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If those individuals were partners, and were liable to contribute to the payment of the debts, the next question is, to what period did they continue to be partners. By the bankruptcy of *Stokes*, there was an end of the original partnership, which was carried on under the stipulations of the deed of *December* 1811. However, the assignees and the three remaining partners chose to continue the business; and they might have continued it either on the footing of that deed or any other footing which they might mutually agree on. It would seem as if no express agreement had been come to on the subject; but they appear to have considered, that they were acting according to the stipulations and provisions of that deed: and in assigning their shares from time to time, and doing other acts, they had those provisions and stipulations in view. In this state of things, it is clear that, up to *December* 1819, *Jefferys* had no reason to believe that *Spurrier* and *Guppy* were not partners, or that *David Smith* was not a partner. In *Jannary* 1819, *Guppy* assigned all his interest in the *Coseley* iron works to *Hodgson*; and, on the 11th of *December* 1819, he gave notice to *Jefferys*, that he had parted with his interest, and that he was no longer to be considered a partner. Shortly afterwards, *David Smith* assigned his interest to *William Taylor Smith*, and gave a similar notice. *Jefferys* refused to treat these notices as a dissolution, or to accept the persons, to whom the shares of *Guppy* and *Smith* had been assigned, as partners in lieu of the assignors. But was it in his power to prevent the partnership from being so dissolved? I am of opinion, that, from the 11th of *December* 1819, *Guppy* ceased to be a partner.

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It is not clear that *Guppy* might not at any time have got rid of his liability by a mere notice; for, a new partnership having been formed, what was there to hinder any individual from retiring from it when he pleased? But, even if that were not so, there was here an actual assignment of *Guppy's* interest to *Hodgson*.

It is said that the assignment was colourable; that is, that it was made for the sake of securing the assignor from future liability. Suppose he made it with that view, he had a right so to protect himself from future liability. It is alleged that the assignee was not a responsible person. Let it be so; *Guppy*, for the purpose of securing himself, had a right to assign to a person not responsible. The only ground of objection would be, that, though there was an assignment in form, there was an understanding between the parties that the assignee should be a trustee for the assignor. Here there is no pretence for such a supposition. I must hold therefore, that, at all events, the assignment, coupled with the notice, freed *Guppy* from future liability.

The same observations apply to the case of *David Smith*. Therefore, in *December* 1819, *Guppy* and *David Smith* ceased to be partners in the concern.

Spurrier continued a partner. It was in his power to have put an end to the partnership at any moment, so far as regarded him. His course would have been, to have given a notice that he would withdraw from the concern: he gave no such notice; and he appears to have acted as a partner down to the time, when the concern was brought to an end and the works stopped.

It appears, indeed, that, after *Guppy* had given his notice of retiring from the partnership, *Spurrier* had
some

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some conversation about stopping the furnaces, on which occasion he stated, that it would be better to give up the works than to carry them on at a loss ; that he placed no confidence in *Jefferys*, and was not on good terms with him ; and that he objected to the change which was made in the firm after *Guppy's* retirement. But merely to object is not enough ; and the evidence before me (particularly a letter in which he asks for the accounts of the concern to *March* 1820) brings me to the conclusion, that he considered himself a partner subsequent to that time.

It is impossible to charge the person to whom *David Smith* assigned his interest as a partner in this concern : for, after the assignment, *Jefferys* would not consent to allow the assignee to act as a partner ; and, when he applied to be admitted to the works, admission was, by *Jefferys's* direction, refused to him. Now that the concern has turned out to be a losing one, *Jefferys* cannot say, that the individual, towards whom he so acted, is to be considered a partner. The same observations apply to *Hodgson* and *T. R. Guppy*.

The decree was to the following effect : “ His Honor doth declare that the Defendants *William Spurrier* and *Samuel Guppy* became and were partners with the Plaintiff and the Defendant *David Smith*, in the concern called the *Coseley* iron-works ; and that the Defendant *William Spurrier* and *S. Guppy* became and were such partners, under and by virtue of the agreements of the 11th of *June* 1818 and 9th of *July* 1818 ; and that the Defendant *William Spurrier* continued and was such partner at the time of stopping the said works : and His Honor doth declare also that the said *S. Guppy* continued such partner down to the 13th day of *December* 1819, and that

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that the said Defendant *David Smith* continued and was a partner in the same concern down to the 22d day of *December* 1819." The decree next directed an account of all dealings and transactions in respect of the concern, "from the 28th day of *March* 1818 (from which time, under the said agreements, *Spurrier* and *Guppy* were to be entitled to the benefit of the concern, in respect of the shares contracted for by the agreements, but without prejudice to the question to whom the profits, in respect of the said shares between the 28th of *March* 1818 and the dates of such respective agreement, belong, as between *Spurrier* and *Guppy*, and the assignees of *Stokes* and *Stevens*) down to the 13th of *December* 1819, and from the 13th of *December* 1819 to the 22d day of *December* 1819, and from the 22d day of *December* 1819 down to the stopping of the said works." Directions were likewise given for taking other necessary accounts; for the sale of the property; and for ascertaining what had become due to or from the Plaintiff and the Defendants during the time they were partners in the concern. The bill was dismissed as against the assignees of *Stokes*, so far as it sought to make them liable as partners.

Reg. Lib. 1826. A. 2448.

1826.

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July 19, 20.

1827.

December 5, 6.

1828.

April 16.

STEVENS v. GUPPY.

THE object of this suit was to enforce the performance of the contract of the 11th of *June* 1818, which has been incidentally mentioned in the case of *JEFFERYS v. SMITH*. That agreement was in the following words:—

“ *William Stevens* agrees to sell, and *Samuel Guppy* agrees to purchase, the said *William Stevens's* three sixteenth shares in the *Coseley* iron-works, including the freehold, leasehold and copyhold lands, buildings, mines, minerals, and all furnaces, forges, mills, machinery, implements, tools, cattle, stock of iron, coals, iron-stone, limestone, cokes, and all other property, moveable and immovable, belonging to the said concern, of and to which he the said *William Stevens* is possessed and entitled, jointly with *John Jefferys*, *David Smith*, and the assignees of *George Stokes* a bankrupt, except only his three sixteenth parts of such debts as were due, or owing to the said concern on the 28th of *March* last, for the sum of 8000*l.*, free from all incumbrances or liabilities affecting the same three sixteenth shares, which the said *William Stevens* is to pay, or allow the said *Samuel Guppy* to deduct and retain out of the said purchase-money of 8000*l.* All debts due and owing to the said concern up to the 28th of

March

A purchaser of a share in a co-partnership business does not waive objections to the title by taking possession of the property and acting as a partner, when the contract stipulates that a good title shall be made by a specified future day, and it appears to have been the intention of the parties that the purchaser should immediately and before that day have the possession.

The vendor of a share in a co-partnership business filed a bill against the purchaser who had taken possession, charging that he had grossly mismanaged

the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically; the Court was of opinion that the title had not been accepted, and, as a good title was not shown, a specific performance could not be decreed:

Held, that, upon a record so framed, no accounts or inquiries could be directed as to the defendant's possession and management of the property, with a view to ascertain whether any and what sum ought to be paid, or compensation made, by him to the plaintiff.

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March last, the said *William Stevens* is to retain his proportion of; and he is to bear and pay his proportion of all debts and liabilities, which the said concern owes and was subject to on the 28th of *March* last: but the said *Samuel Guppy* is to receive and pay three sixteenth parts of all debts contracted with or by the said concern, since the 28th of *March* last. *William Stevens*, on or before the 24th of *June* “next*,” at his own expense, is to deduce a good title to the premises hereby contracted for, and to convey, assign, and surrender the same to the said *Samuel Guppy*, free from incumbrances, except rent and royalties which the said lands and mines are subject to and shall have become due since the 28th of *March* last; and the said *Samuel Guppy* is to pay the expense of the conveyances, assignments, and surrenders to himself of the said premises contracted for, except such fines on the surrender of the copyhold property, as may become due to the lord or lords of the manors respectively, wherein such copyhold property is. The said *William Stevens* engages, that the accounts of debts contracted with, and by the said concern, since the 28th of *March* last, are correctly stated in the books of the said partnership concern. The balance of the purchase-money to be paid, as soon as a good title can be effected, the incumbrances and liabilities, and conveyances, assignments, and surrenders as aforesaid made, in the said *Samuel Guppy’s* bill or bills in *London*, at three calendar months after date, and to be dated at that time.”

At the foot of the agreement was the following memorandum, showing the mode in which the price was estimated:—

For

* The word “next” was in of the memorandum which was the bill; it was not in the copy produced in court.

For three sixteenths of the <i>Coseley</i> iron-works,	
32,000 <i>l.</i>	£6,000
For three sixteenths of stock in trade, 8,035 <i>l.</i>	1,500
For the profits of the three sixteenths, since	
<i>Lady-day</i>	500
	<hr/>
	£8,000
	<hr/>

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Stevens, immediately, with the privity of the other co-partners, retired from the concern, and gave possession of his shares to *Guppy*, who acted as the owner and conducted the business in the manner, and until the time, more particularly mentioned in the report of *Jefferys v. Smith*.

In *June* 1819, *Stevens* filed his bill for specific performance, and it was amended in *June* 1820. He had been induced, he said, to admit *Guppy* into the possession of the shares, in consequence of his having promised to pay the purchase-money immediately. Many requests, he alleged, had been made to the Defendant specifically to perform his agreement, "or otherwise to let him the Plaintiff into the possession of his three sixteenth shares of the partnership concern, estates, and property:" and he insisted that the Defendant, by continuing to act as the owner of the shares and as a partner, had accepted the title. The bill charged that *Guppy* and his partners had first mismanaged, and then put an end to, the business, and that they had removed from off the premises all or the greater part of the moveable machinery, implements, and stock in trade; that, by such conduct, the co-partnership concern had been ruined or greatly deteriorated, and rendered of much less value than when the Plaintiff relinquished possession to *Guppy*; that the established connections of the co-partnership with numerous highly respectable customers had been thereby lost, so that,
even

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even if the iron-works could be restored to the state in which they were, when *Guppy* entered into possession, yet it would be impossible to recover the old established connections with the former customers. The prayer was, that *Samuel Guppy* might be declared to have waived all objections to the title to the shares, and might be decreed specifically to perform the agreement, and that, in the mean time, he might be directed to pay the purchase-money into court; or otherwise, that a proper person might be appointed as a receiver or manager, to collect the rents, issues, and profits of the shares of the partnership concern so contracted to be sold, and to manage the same; and that the Defendant might be restrained from interfering or meddling with the shares, or with the rents, profits, and produce thereof. It concluded with the common form of words, asking relief generally.

Guppy, by his answer, admitted the agreement, and stated that he had always been willing to perform it, if a good title were shown, but that no abstract had ever been delivered to him. He denied that he had ever promised to pay the purchase-money before the title was perfected; or that possession had been given him in consequence of any such undertaking on his part. He stated that he had assigned one of the three shares to *Spurrier*, and the other two to *Hodgson*, who had since transferred them to *T. R. Guppy*; and that the latter was unable to pay for them, and would willingly restore them to the Plaintiff. He denied that he had been accessory to any mismanagement of the property, or that he had received any part of the rents, issues, and profits of the shares which were the subject of the contract: on the contrary, the partnership had become indebted to him during the period of his connection with it; and he submitted, whether he could be considered a partner, except in relation

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relation to the creditors of the concern. He was willing and desirous, he said, to give up the possession of the shares to the Plaintiff; but the latter refused either to resume the possession, or to make out a title.

The Plaintiff entered into evidence, to prove the deterioration and destruction of the business, and the active interference of *Guppy* as a partner.

At the hearing, the Vice-Chancellor directed the usual reference of title.

It turned out that the title was defective; and, at the hearing on further directions, the Vice-Chancellor dismissed the bill with costs.

The Plaintiff appealed, first, from the decree directing a reference of title, and, afterwards, from the decree made on further directions.

Mr. Heald and *Mr. Lovat*, for the appellant.

I.—At first, *Guppy* could not have been compelled to take the property, if the title was defective; but he has chosen to enter into possession, before a good title was shown; he has dealt with the property as owner; its value has been diminished; while in his hands, it has, to a certain extent, ceased to exist: can he now say, that, unless a perfect title is deduced, he is not pay his purchase-money? The agreement did not authorise him to take possession, or to do any acts of ownership. In taking possession, he accepted the title. It is true that no abstract had been delivered; but a purchaser may do acts which will preclude him from objecting to the title, whether an abstract has been delivered or not; though, undoubtedly a slighter circumstance will amount to a waiver

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waiver of all objections, when he has been furnished with the means of being acquainted with the nature of the title, than before the delivery of an abstract. Here the particulars of the title were known to the other partners: and *Guppy*, no doubt, was contented with the title which satisfied them. On the part of the vendor, the agreement was specifically performed. *Guppy* had the full benefit of the contract; he had uncontrolled dominion over the property; the shares of the business and of the stock in trade were put into his hands, and placed at his disposal. Is it rational to suppose, that, after such steps had been taken, it was still to remain a matter of doubt, whether he was to pay the purchase-money? It is not possible for him to restore to us the thing he purchased, and which we delivered to him: must he not, then, pay the price which he agreed to give for it?

II. — If we cannot compel *Guppy* to perform the contract, he must be considered as having taken possession of the shares as our agent, and he must account to us for the mode in which the property has been dealt with, and for the monies which he has received in respect of it. The record alleges that he acted as a partner, and that, under his management, the property has been greatly deteriorated; and there is evidence to show, that the three shares are by no means of the same value now as when the possession was given to him. We are, therefore, entitled to compensation for the injury which we have thus sustained. It is only in a court of equity that the accounts and inquiries, necessary for ascertaining the extent of that damage, can be conveniently prosecuted; and under the prayer for general relief, connected with the charges of mismanagement which the bill contains, these accounts and inquiries may be directed in this suit.

Mr.

Mr. Hart, Mr. Preston, and Mr. Romilly, contra.

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I.—It is plain from the whole tenor of the contract, that, at the time when it was made, both parties intended, that *Guppy* should immediately enter into the enjoyment of all the rights of a partner. What he bought was the share of a trade, in which, from that day, he himself was to have, and *Stevens* was not to have, a right of interference as a partner; he did not buy the share of a trade from which he himself was to be excluded during the long period that might be occupied in an investigation of the title. The possession was given and was accepted on the mutual belief that a good title could and would be made. The agreement stipulates in the most express terms that a good title shall be deduced, and that, till it is deduced, the purchase-money shall not be paid. The delivery of possession must have taken place in pursuance of the agreement, with which it was almost contemporaneous; for there is not a pretext for saying that the parties entered into any subsequent arrangement, by which the terms of the original agreement were modified. The 24th of *June* mentioned in the agreement, must have meant the 24th of *June* 1819. The parties, therefore, did not contemplate the completion of the title, in less than twelve months; is it possible that they could have meant, that, during the whole of this period, *Guppy* was to have no concern in the business? The contract of the 11th of *June* made him a partner from that date; in acting as a partner, he acted under that contract, and he cannot have thereby lost any of the rights which the contract expressly gave him. He, therefore, retains the right to insist on the production of a good title; and, as it is admitted that the objections to the title are insurmountable, the vendor cannot have a decree for specific performance.

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II. — The Plaintiff, if he is not entitled to a decree for specific performance, cannot have any other relief on this record; for the Court will not permit a bill, framed for one purpose, to be converted to a purpose totally different. The record treats *Guppy* as purchaser: at the bar, the Plaintiff, finding he can have no relief against him in that character, proposes to consider him as his agent. The particular relief which may be prayed at the bar, under the prayer for general relief, must be agreeable to the case presented by the bill: but with that case, the particular relief asked here is totally inconsistent.*

Mr.

1825.
June.

* WILLIAMS v. SHAW.

On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, and, pending the suit, continued in possession until 1823, the Plaintiff, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the Court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated by his answer that he was willing to pay a fair rent.

By a written contract, dated the 23d of *December* 1813, *Morgan* agreed to sell, and *Shaw* to purchase, a certain farm for the sum of 9000*l.*, of which 100*l.* was to be paid down immediately, *Morgan* was to deliver abstracts and to deduce a marketable title on or before the 1st of *March* then next; and, on receiving the remainder of the purchase-money, was to execute a proper conveyance of the premises on or before the 24th of *June* 1814. *Shaw* was to have possession of the meadow, pasture, and wood lands on the 25th of *December* 1813; of the arable lands, on the 2d of *February* following;

and of the rest of the premises, on the 1st of *May*. If the purchase was completed on or before the 24th of *June*, *Shaw* was not to pay any rent for the premises in the meantime; but if the purchase should not be completed by that day, for any reason other than a defect in the title not cured by the vendor on or before the 25th of *December* 1814, *Shaw* was to pay interest at 5 per cent. on the unpaid residue of the purchase-money: and if, on account of defect of the title, the purchase should not be completed, *Morgan* was to repay the 100*l.* with interest at 5 per cent. on the 25th of *December*

Mr. Heald, in reply.

Suppose we were at liberty to amend the record instantaneously by praying in the alternative, that, if the Court did not decree specific performance, the Defendant might

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December 1814. The title was to be submitted to counsel on behalf of both parties ; and if such counsel should be of opinion, that a marketable title could not be deduced by the 25th of *December* 1814, the contract was to be absolutely void.

The bill was filed by the representatives of the vendor, for the specific performance of the contract.

During the progress of the suit, the Defendant continued in possession. But he stated in his answer, that he was then, and always had been, willing to give up possession of the farm ; and that, in *May* 1816, he had served the Plaintiff with notice that he was ready to give up the farm to him forthwith, on being paid the value of the crops on the ground, or at any future time, when the crops should have been harvested. He further said, that he was willing to pay a fair rent for the premises during the period of his occupation, on having the

deposit of 100*l.* with interest repaid to him.

In the course of the suit it appeared, that the vendor could not make a good title ; and, in 1823, the possession of the lands was relinquished to the Plaintiff.

At the hearing on further directions, the Plaintiff, admitting that the bill must be dismissed so far as it prayed a specific performance of the contract, asked, that the Defendant might account for the rents and profits of the farm during the nine years of his occupation.

Mr. Hart and *Mr. Knight* for the Plaintiff.

The possession of the Defendant was under the contract ; and as the contract cannot be performed, he ought not to be allowed to derive any benefit from it. Both parties must be placed, as far as possible, in the same situation as at the date of the agreement ; and that can be done only by making the occupier

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might account for his dealings with the property, it would not be necessary to introduce into the statements of the bill any allegation which is not already there.
How

cupier of the land pay rent to the owner. This is a relief, the right to which arises out of the two facts, that the Defendant has occupied the farm, and that he is not to be the purchaser of it; and it may be given under the prayer for general relief. His offers to quit the lands amount to nothing; they cannot outweigh the fact of the voluntary continuance of his occupation. Besides, the Defendant, by stating in his answer that he was ready to pay a fair rent, has decided the question against himself, and given the Court jurisdiction to compel the payment of the rent in this suit.

Mr. *Heald* and Mr. *Pepys*, *contrâ*.

The result, which the Plaintiff now considers as a grievance, is the natural consequence of the protracted litigation, which he himself has occasioned by his obstinacy in endeavouring to compel performance of a contract, which he ought to have abandoned at once. He would neither desist from his suit, nor take possession of the

lands. If he be entitled to a rent, he must seek it by a distinct remedy.

It was suggested, that a case had occurred before Sir *William Grant*, in which, though a bill for specific performance was dismissed, the purchaser, having been in possession, was ordered to account for the rents: and the Vice-Chancellor stated, that, if a precedent for such a decree could be produced, he should be very much inclined to follow it in the present instance.

The case stood over, in order that the Plaintiff's counsel might search for authorities; but no precedent was found of such a decree as they asked.

Finally, the Vice-Chancellor stated that, on the record as it stood, an account of rents could not be decreed. The bill did not tender any issue as to the rents, or pray relief in respect of them: it was framed solely with a view to compel a specific performance of the contract; and an account

How then is it possible to say, that such particular relief is not agreeable to the case stated by the bill?

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ELDON, Lord Chancellor.

I doubt very much whether there is not enough in this bill to enable the Court to administer any equity arising out of the transactions that took place in consequence of the possession being given to *Guppy*. Does not the equity, insisted upon in the body of the bill, amount substantially to this, that the Defendant may either specifically perform the contract, or that he may deliver back again the possession which he had received? And though the words "that he may deliver back again the possession which he has so received," are not to be found in the prayer, yet, when the Plaintiff asks by his bill a specific performance of the agreement, or such other relief as the nature of the case requires — if the effect of the case, which he states, be, that, if he is not entitled to a specific performance, the possession should be restored to him, and an account should be gone into of the Defendant's dealings with the property, — it is worthy of consideration, whether the mere omission of alternative words in the prayer is sufficient to prevent him from having that equity (if such an equity there be) administered in this suit.

I take for granted that the decree of the Vice-Chancellor was made with an intention on his part to pronounce

account of rents, far from being a good deal of hardship in included in, or subservient to, the case, the Court could that particular relief, was make no order, except that wholly inconsistent with it. the bill should be dismissed Therefore, though there was with costs.

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nounce that the title had not been accepted; for the reference would have been unnecessary, if he had been of opinion, that the Defendant was bound to accept the title, whether it was good or bad. The decree, however, contains no declaration either way. According to the old practice, there were two ways of framing a decree in a suit for specific performance. The one was, to declare that the Plaintiff was entitled to a specific performance, if a good title could be shown, and then to direct a reference as to the title; the other, to refer the title to the master, and to follow up that direction by a declaration, that, if a good title was shown, the agreement ought to be specifically performed: and, in my opinion, difficulties may often arise from omitting to make a declaration in the decree.*

The question now before me is twofold: first, whether the Defendant is bound to accept the title; secondly, if the Plaintiff cannot compel a specific performance, whether any other relief can be given him on the bill as it is now framed.

I must take the word "next" to be part of the contract, upon the authority of the Plaintiff himself; because he has so stated it in his bill: and by "the 24th of *June* next," I understand the 24th of *June* 1819. That is the natural construction of the words; and there is no evidence that it was understood between the parties, that
the

* In *Pitt v. Davis* (July 17th 1826), the Lord Chancellor said, "In suits for specific performance, where the question of title is not the only issue, but the Defendant insists that, whether the title be good or bad, the Plaintiff is for any reason not entitled to specific performance, it is specially necessary that there should be, in the first instance, a declaration that the Plaintiff is entitled to have the contract specifically performed, if a good title be shown."

the abstract of the title could be immediately prepared, so as to be delivered on the 24th of that very month of *June* in which the contract was entered into.

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The question comes to this — Does the ordinary rule about taking possession apply to such an agreement as the present? Was it the intention of the parties, regard being had to the express terms and stipulations of the contract, that Mr. *Stevens* should be at liberty, until the 24th of *June* 1819, to keep possession of the property, which, if the agreement was ever carried into execution, was to belong, from *March* 1818, to Mr. *Guppy*, and not to Mr. *Stevens*? or must it not have been the intention of these parties, considering what the period was at which the beneficial interests and the liabilities were to begin, that the possession should be taken immediately — nevertheless, with an unfortunate contract on the part of Mr. *Stevens*, that he would deliver the abstract, deduce a good title, and convey the premises, not then, but on or before the 24th of *June* 1819? And can it be said, under the effect of such an agreement as this, that the mere taking possession is a waiver of the right to have the title made out, which, by the very terms of the contract, was not to be made out till fifteen months after the beneficial interest and liability (both of which were to begin nearly three months before the date of the contract) had commenced?

The bill alleges that the possession was taken, because *Guppy* prevailed upon the vendor to let him take possession on condition of his immediately paying the purchase-money: but of this new bargain I have heard no evidence whatever. Under these circumstances, I think that the mere taking possession would not amount to a waiver of all objections to the title. It is a different matter, how far the use which has been made of the

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possession, the management to which it has been exposed, the deterioration of the concern, &c., are to entitle the plaintiff to relief against the party who contends that he had a right under the agreement to immediate possession, and yet was not bound to retain that possession, unless a good title could be shown.

If the question as to what may be due between the parties, in respect of the dealing with the property, be not open on this record, the decree ought to be without prejudice to any future bill on the subject.

Judgment not having been pronounced when Lord *Eldon* resigned, the appeal was again argued before Lord *Lyndhurst*.

1827.
December 5, 6.

Mr. *Heald* and Mr. *Lovat*, for the Plaintiff,

Mr. *Sugden*, Mr. *Preston*, and Mr. *Romilly*, for the Defendant.

1828.
April 16.

LYNDHURST, Lord Chancellor,

After stating the outline of the facts of the case, expressed his opinion to be, that, looking at the terms of the agreement and the nature of the property which was the subject of it, nothing had been done which amounted to a waiver, on the part of the Defendant, of his right to have a good title. It is now admitted, continued His Lordship, that, as to some of the lands, which formed an essential part of the property of this partnership, a good title cannot be shown; and, therefore, the vendor cannot have a decree for specific performance.

It is then said, that, though he cannot have the contract performed, he is entitled, upon the frame of this record,

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record, and under the prayer for general relief, to a remedy of a different kind, namely, to have an inquiry concerning the management of the partnership by *Guppy*, and to have compensation for the injury he *Stevens* has sustained. It is true, that the bill does contain charges of mismanagement of the property by *Guppy*: but with what view and for what object are those charges introduced? We have only to look at the record to see, that they are introduced, not with a view to demand compensation for any loss alleged to have been sustained, but in order to establish the fact of acceptance of the title by the Defendant, and of waiver of all objections to it, and thereby to make out the Plaintiff's right to specific performance. Under such circumstances, it would be unjust to allow the Plaintiff to abandon the case made by his bill, and to come, at the hearing, for a new remedy upon a record framed with an aspect altogether different. My opinion, therefore, is, that, as the case is shaped before me, the Plaintiff is not entitled, under the general words of the prayer, to particular relief with respect to the loss arising from the management of the property.

Besides, there were other persons interested in the partnership, when the alleged mismanagement took place. How, under a decree between *Stevens* and *Guppy* alone, could all the liabilities be arranged, which may be involved in giving *Stevens* the compensation he asks? It is not in such a suit as this that he can obtain compensation for the loss which he alleges he has sustained.

Lord *Eldon*, when the case was before him, stated that, if he dismissed the bill, he should think it proper to add, as a qualification to the decree, that the dismissal should be without prejudice to any suit or proceeding, which *Stevens* might think fit to institute, for the purpose

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STEVENS
v.
GUPPY.

purpose of recovering compensation for any injury or loss which he might have sustained by the acts of the Defendant. This has been done in several cases; and an instance of it occurs in *Lyndsay v. Lynch*. (a) I shall take that course, and shall modify the decree by a similar qualification.

(a) 2 Sch. & Lef. 12.

1827.
Feb. 16.

BARKSDALE v. ABBOTT.

A sum of stock, claimed as a legacy by A., was ordered by the decree to be carried over to the account of A., "subject to the further order of the Court," with a direction that it should not be sold or transferred without notice to B.: Held, that the Court might, upon petition and without rehearing the former decree, order the money to be paid to B., if his title appeared to be the better of the two.

IN a suit for the administration of a testator's assets, the Master found that a legacy of 200 guineas, bequeathed to *Joshua Sharpe*, was a vested legacy, and due to *Joshua Sharpe's* personal representative.

By a decree made on the 16th of *February* 1826 it was ordered, that it should be referred to the Master to compute interest on the legacy given to *Joshua Sharpe*; that, from the fund in court, a sum of Bank annuities, sufficient to answer the principal and interest of the legacy, should be carried by the Accountant-General to the account of the representatives of *Joshua Sharpe*; that the Accountant-General should declare the trusts thereof accordingly, subject to the further order of the Court; and that the Bank annuities, when so carried over, should not be sold or transferred without notice to the Plaintiff, who was the person entitled to the residue.

The representative of *Joshua Sharpe*, who was not a party to the suit, having presented a petition for the payment of the money, a cross petition was presented by the Plaintiff, on the ground that *Joshua Sharpe*, being
named

named one of the executors of the testator, had not proved, and that he had thereby forfeited his legacy. (a) The Plaintiff, therefore, claimed the sum which had been thus carried over.

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Mr. *Shadwell* and Mr. *Beames* argued, that the Court had no jurisdiction to order the payment of the money to the Plaintiff upon his petition. The decree had carried the legacy to the account of the personal representative of *Joshua Sharpe*, and could not be altered except by a rehearing or appeal. If that course were taken, the petition of *Joshua Sharpe's* personal representative might be ordered to come on at the same time.

Mr. *Sugden* and Mr. *Jacob* stated, that, when the decree was made, the intention was to keep this question open; and they contended that the special words, annexed to the direction to carry over the sum to a separate account, were sufficient to reserve to the Court jurisdiction to order the money to be paid to a person claiming adversely to *Joshua Sharpe*.

The MASTER of the ROLLS •

Was of opinion, that the words “subject to the further order of the Court,” and the direction not to pay the money to the person, to whose account it was carried over, without notice to the residuary legatee, were sufficient to keep the question open; and that the Court had jurisdiction to order the money to be paid to the Plaintiff upon his petition, without re-hearing the former decree.

The order was accordingly made on the Plaintiff's petition.

(a) See *Cockerell v. Barber*, 2 *Russell*, 585. and the cases there cited.

1826.

Feb. 18.

PUTNAM v. BATES.

An admission of a debt by the executrix of a trader, within six years before the filing of a creditor's bill, will not take the debt out of the statute of limitations, so as to enable the creditor, under the 47 G. 3. c. 74., to claim payment out of the real estate in the hands of a devisee.

THE bill was filed by a simple contract creditor of a testator, who, at the time of his death, was a trader within the meaning of the bankrupt laws, for the administration of his assets, and the payment of his debts out of his real, as well as his personal, estate. The Defendants were *Sarah Bates*, the executrix and devisee of a moiety of the real estate of which the testator died seised, and *Bishenden* and his wife, who were the devisees of the other moiety.

Bishenden and his wife did not admit the Plaintiff's demand; and they insisted that the debt, even if it ever had been due, was now barred by the statute of limitations.

Sarah Bates, the executrix, did not insist on the benefit of the statute.

Proof was given of payment of part of the debt by the executrix within six years, but there was no evidence of any admission of the debt by *Bishenden* and his wife.


The question was, Whether the Plaintiff was entitled to any decree against *Bishenden* and his wife, and against so much of the real estate as they were interested in.

Mr. *Barber*, for the Plaintiff.

The 47 G. 3. c. 74.(a) provides that the real estate, of which

(a) The words of the act are, time of his death a trader, within
 "When any person, being at the the true intent and meaning of
 the

which a trader dies seised, "shall be assets to be administered in courts of equity for the payment of all his just debts." This debt, being proved against the executrix, is a just debt now due from the testator; and, therefore, the Court is bound by the words of the act to apply the proceeds of the lands in the discharge of it. When once the demand is established against the primary fund, the heir or devisee cannot be heard to say, that, so far as regards the auxiliary fund, it shall be treated as a nonentity.

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The argument is, that the admission of the executrix has taken the case out of the statute of limitations; and it seems to be admitted, that, but for this admission, the statute would have applied. Now, how can the act of the executrix be evidence against the devisee or heir? Whether does the Plaintiff contend that the statute of limitations does not apply to a demand made under the 47 G. 3. c. 74., or that the circumstances of this case take it out of the statute?

Mr.

the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which before the passing of this act would have been assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity, for the payment of all

the just debts of such person, as well debts due on simple contract as on specialty; and the heir or heirs at law, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of this act liable to at the suit of creditors by specialty, in which the heirs were bound."

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BATES.

Mr. Barber.

The statute of limitations applies thus far — that the creditor is bound to make out that there is a just debt owing to him by the deceased trader, *i. e.* a debt, which, before the 47 G. 3., he would have been entitled to have had paid out of the personal estate, so far as it would extend; and if the debt were barred by the statute of limitations, so that he could not recover payment from the executor, he could not go against the heir or devisee. But the object of the 47 G. 3. was, to make the lands of traders liable to every demand which could be enforced against the personal assets; and when once the debt is established against the primary fund, and the application of the statute of limitations, as between the creditor and that fund, is excluded, the persons interested in the auxiliary fund cannot set up such a bar to the claim of the creditor.

Mr. Horne and Mr. Parker, for Bishenden and his wife.

The Plaintiff, asking payment of his debt out of our fund, must prove his debt against us; and as we insist on the benefit of the statute, he must prove against us an admission of the debt within six years before the filing of the bill. The executrix cannot by her admission bind the real estate; and no demand can be considered as a just debt, till it is proved against those from whom payment is sought. *Tullock v. Dunn (a)*, *Tredgold v. Atkins. (b)*

Mr. Roupell, for Sarah Bates.

The MASTER of the ROLLS.

The Plaintiff admits that he must prove the debt
against

(a) 1 *Ryan & Moody*, 416.

(b) 2 *Barn. & Cres.* 23.

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against the executrix, and that he must also prove an admission within six years. He admits, further, that, for the purpose of affecting the real estate, he must prove the debt against the heir or devisee as well as against the executrix : if, in a proceeding at law, he were to recover on a promise made by the executrix, he can scarcely contend that such a judgment would be evidence against the heir or devisee. But as the original existence of the debt must be proved against the devisee, is it not equally necessary to prove against him an admission of the debt within six years ? If the admission by the executrix within six years be sufficient to take the case out of the statute of limitations as against the heir or devisee, why should not her admission be equally evidence against him as to the original existence of the debt ? If it be necessary to prove the debt against the devisee, it must be equally necessary to prove some admission within six years, that can affect him.

The decree can be only against *Sarah Bates*.

1827.

March 1.
June 18.

ROADLEY v. DIXON.

A testator, after bequeathing to his wife an annuity, charged on his estate at *S.*, with power of entry and distress, if it should be in arrear for thirty days, and giving other legacies and annuities, which he charges on his lands at *S.* in aid of his personal estate, gives and devises all his real and personal property to trustees, upon certain trusts; and he directs them to occupy and manage, during the minority of his son, a farm constituting the greater part of his estate at *S.*, and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates: Held, that the widow must be put to elect between her dower and the benefits given her by the will.

RICHARD ROADLEY, being seised in fee of certain lands and hereditaments situate at *Searby*, and various other real estates, made his will, wherein he bequeathed to his wife *Ann Roadley* and her assigns during her life, a clear annuity of 100*l.*, to be paid out of his estate at *Searby*, and paid to her by two payments in the year; “ And I do hereby charge and continued the testator, “ and subject the said estate at *Searby*, to and with the payment of the said annuity yearly rent or sum of 100*l.* accordingly; and it is my will and desire, that, in case the said annuity, or rent or sum of 100*l.*, or any part thereof, shall be in arrears at any time during the life of the said *Ann Roadley*, be paid or unpaid, by the space of thirty days next over or under either of the aforesaid days or times whereon the same is hereinbefore directed to be paid as aforesaid, lawfully demanded, then and so often, it shall and may be lawful to and for my said wife *Ann Roadley*, and her assigns, to enter upon the said estate hereby charged with the said annuity as aforesaid, and to distrain for the same annuity, or for so much thereof as shall be in arrear, and the distress and distresses then and there found to detain and keep, until she shall be fully paid and satisfied, all such arrears of the said annuity, with costs and charges in and about the making and keeping of the said distress for the same; and I do hereby give and bequeath to my said wife *Ann Roadley*, for her own use and benefit, all my household furniture, linen, china, books, liquors, provisions, and other household goods and furniture that may be in and about the dwelling house at *Searby* at the time of my decease.”

dwelling-house at the time of my decease; also, I give and bequeath unto my two nephews *Thomas John Dixon* and *James Green Dixon* the sum of 4000*l.*, upon trust," to pay the interest and dividends to his wife *Ann Roadley* during her life, in addition to the rent-charge before given to her, and, after her decease, to pay the 4000*l.* to her two daughters. "And I do hereby charge and subject my said estate at *Searby* to and with the payment of the said sum of 4000*l.* accordingly. I also give and bequeath unto my said wife, *Ann Roadley*, during the minority of my said son *Richard Dixon Roadley*, the use and enjoyment of my dwelling-house, situate in *Searby* aforesaid, with the appurtenances thereto belonging, free of rent." After bequests of some other legacies and an annuity, the will proceeded in the words following: "And I do hereby subject, charge, and make chargeable all my said estate at *Searby* (in aid of my personal estate) to and with the payment of the said legacies and annuities accordingly; also, I give, devise, and bequeath unto the said *Thomas John Dixon* and *James Green Dixon*, and the survivor of them, and the heirs, executors, and administrators of such survivor, during the minority of my said son *Richard Dixon Roadley*, all my manors, farms, messuages, cottages, lands, tenements, hereditaments, and real estate, situate, lying, and being at *Searby-cum-Owmbly, Owmbly, Messingham, North Kelsey, Hibaldstow, and Pilham*, in the county of *Lincoln*, or elsewhere in the kingdom of *England*, (subject, nevertheless, as to the said estate at *Searby*, to the payment of the said annuities and legacies aforesaid, in aid of my personal estate,) and also all my ready money, debts, securities for money, goods, chattels, farming stock, and utensils, and all other my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever not hereinbefore by me given and bequeathed, (subject to the annuities and


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legacies hereinbefore by me given and bequeathed, and to the payment of my just debts, funeral and testamentary expenses,) upon trust, that my said trustees, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall, from and out of the rents, issues, dividends, and produce of my said real and personal estates respectively, pay, for the maintenance and education of my said son *Richard Roadley*, such sum and sums of money, as they, my said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall think fit; and, upon further trust, that they, my said trustees do and shall, during the minority of my said son, occupy and manage the farm now in my own possession, employing a proper person as bailiff to superintend the same, and let or manage the residue of my real estate and receive and take the rents, issues, proceeds, and profits of the whole of my said real estates, and also the interest, dividends, and produce of my personal estate and of any accumulation thereof, and from time to time lay out and invest the surplus or residue thereof respectively which shall from time to time come to and remain in their hands, and shall not be applied or appropriated for any other of the purposes of this my will in the joint names of my said trustees, or in the name of the survivor of them, in the public stocks or funds, or upon government or real securities, in order to accumulate for the benefit of my said son, *Richard D. Roadley*, and, subject to the aforesaid annuities, and my debts and funeral expenses, and the legacies by this my will bequeathed, and the devises and bequests hereinbefore made, I give, devise, and bequeath all and singular my said real and personal estates and effects, and all additions to or accumulations which shall arise by the means aforesaid, or any of them," unto his son *Richard D. Roadley*, his heirs, executors, administrators, and assigns

assigns; but in case the son should die under the age of twenty-one years, unto his, the testator's, two daughters, their heirs, executors, administrators, and assigns, as tenants in common.

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The estate at *Searby* consisted of a mansion-house, and about 1080 acres of land, of which about 943 were in the testator's own occupation at the time of his death.

The widow filed her bill, claiming dower out of all the real estates of the testator, in addition to the benefits given to her by the will.

The only question in the cause was, Whether the widow was to be put to her election between her dower and the benefits given her by the will, or whether she was entitled to take both?

Mr. *Sugden* and Mr. *Sidebottom*, for the Plaintiff.

The rule of law on this subject is now settled. "The right to dower," says Lord *Redesdale*, "being in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated by express words, or by clear and manifest implication. In order to exclude such right, the instrument itself must contain some provision inconsistent with the assertion of such legal right." (a) In *Lawrence v. Lawrence* (b) it was decided by the House of Lords, that a devise to the widow of a part of the land, out of which she is dowable, does not exclude her from her right of dower; the sole possession of a part of the lands, out of which the dower is to issue,
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(a) 2 *Sch. & Lef.* 452, 453. in the note. 1 *Bro.* 292. Mr.

(b) 2 *Vern.* 365. *Freem.* 234. *Belt's* note, No. 3.

3 *Bro. P. C.* 484. 1 *Swanst.* 398.

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not being deemed inconsistent with the assertion of a legal right to the third of the whole. On the same principle proceeded the early cases of *Hitchen v. Hitchen* (a), and *Leman v. Leman* (b), and the recent decisions of Lord Redesdale in *Birmingham v. Kirwan* (c), and of Sir Thomas Plumer in *Lord Dorchester v. The Earl of Effingham*. (d) If, therefore, the testator had devised to his widow the whole of his lands at *Searby*, she would have been entitled to dower out of his other lands: can a gift of an annuity charged upon those lands destroy a right, which a devise of the lands themselves would not have affected?

In principle there is no inconsistency between a right to an annuity issuing out of an estate, with powers of entry and distress, and a right of dower out of the same estate. As dowress, the widow is entitled to one third of the lands; as annuitant, she has an interest in the rents of the whole, and, consequently, of the other two thirds, as a security for the payment of the yearly sum. As dowress, she need not be in possession of any specific portion of the estate; she may be satisfied with a rent-charge, or with a third part of the rents and profits; and it is a mere accident if she has possession as annuitant, for default in payment of the annuity is not to be presumed. But even if she were to have her dower assigned by metes and bonds, and if she did enter and distrain, what inconsistency is there between her being in possession of a part of the estate as dowress, and distraining on the other part of it in a different right? In truth, the only effect of her being dowress and annuitant is, that, practically, the security for her annuity is less ample than if the lands charged with it were not subject to dower.

Accord-


(a) *Prec. in Chan.* 133.

(c) 2 *Sch. & Lef.* 444.

(b) 2 *Eq. Ca. Abr.* 353. pl. 13.

(d) *Coop.* 319.

Accordingly, it has been repeatedly decided by the highest authorities, that a widow is not put to her election by a gift of an annuity, though issuing out of the estate which is subject to dower, and secured by powers of entry and distress. That doctrine was clearly established by Lord *Hardwicke*, in *Pitts v. Snowden* (a); by Lord *Thurlow*, in *Foster v. Cooke* (b); and by Sir *William Grant*, in *Greator v. Cary*. (c) In *Pearson v. Pearson* (d) Lord *Loughborough* adopted and recognized the same principle, though some have doubted whether the mode, in which he there applied it, would stand investigation; and it repeatedly received the sanction of Lord *Alvanley*, more especially in the cases of *French v. Davies* (e) and *Strahan v. Sutton*. (f)

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It is true there are four cases which lead the other way : — *Arnold v. Kempstead* (g), decided by Lord *Northington*; *Villa Real v. Lord Galway* (h), by Lord *Camden*; *Jones v. Collier* (i), by Sir *Thomas Sewell*; and *Wake v. Wake* (k), by Mr. Justice *Buller*. But those cases are in direct opposition to the more numerous, as well as more weighty, authorities on the other side; and they cannot be supported, unless the Court is prepared to hold, that every gift of a rent-charge will exclude the widow from her dower. Indeed in *Villa Real v. Lord Galway*, Lord *Camden* states the question in that form, and professes to decide that abstract point, and no other; for, though in that case there was a clause of distress and entry, it cannot be of the least importance in equity, whether the gift of
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(a) 1 Bro. C. C. 292. n.

(b) 3 Bro. C. C. 347.

(c) 6 Ves. 615.

(d) 1 Bro. C. C. 292.

(e) 2 Ves. jun. 572.

(f) 3 Ves. 249.

(g) Ambl. 466. 2 Eden, 236.

(h) Ambl. 682. 1 Bro. C. C. 292.

(i) Ambl. 730.

(k) 3 Bro. C. C. 255. and 1 Ves. jun. 335.

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an annuity is or is not accompanied with such powers. If it be law that a widow is put to her election by the mere bequest of a rent-charge, almost every Judge of this Court has been ignorant of one of its most important rules: if such be not the law, the decision of Lord *Camden* cannot be sustained. *Arnold v. Kempstead* appears to have been determined without much consideration. *Pitts v. Snowden* was not even cited in it; and Lord *Northington* founds his opinion upon *Noys v. Mordaunt* (a), which has not the least bearing on the subject. *Jones v. Collier* and *Wake v. Wake* are mere echoes of *Arnold v. Kempstead* and *Villa Real v. Lord Galway*.

Mr. *Shadwell* and Mr. *Skirrow*, *contra*.

Villa Real v. Lord Galway has never been over-ruled; and, though cases differing from it in circumstances, have received a contrary construction, it must still be considered as affording the rule of decision, whenever a like state of facts occurs. The question is not as to the effect of a simple bequest of a rent-charge, but on the effect of all the dispositions contained in the will. The point for consideration is, whether, though the widow should have dower assigned to her in due form of law, every direction contained in the will could still be performed? If it could not, she must be put to her election. Now here, various annuities and legacies, in some of which the widow is herself interested, are charged on the estate at *Searby*; and the whole of that estate is to form a fund for answering those charges: is not that disposition inconsistent with the exercise of a right on the part of the widow, which would withdraw a great part of the property from the operation of the will? The testator devises

(a) 2 Vern. 581.

devises to his trustees all his lands and hereditaments: they are themselves to occupy one farm; and they are to receive the rents of the whole of the estates. How is it possible that this direction can be complied with, if one third of the lands be assigned for dower? *Goslin v. Warburton* (a), *Chalmers v. Storil*. (b)

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Mr. Sugden, in reply.

Where a testator devises his estates, and directs his devisees to receive the rents, he must be considered as devising that which was his to give, namely, his lands, subject to the dower of his wife. Suppose that he by his will gave a rent-charge to *A.*, and, subject to that rent-charge, devised his lands to *B.*; it must be admitted, that *B.* would take the lands, burdened with the wife's dower. What difference does it make to the devisee, whether the rent-charge is given to the wife or to *A.*? It is admitted, that the devise of the lands, subject to a rent-charge given by the will, does not exclude dower; neither is the wife's right barred by the mere bequest to her of an annuity issuing out of the real estate. How then can it be destroyed by the combination of two circumstances, neither of which, taken singly, can affect it, and of which neither alters the operation of the other? The same observations apply to the direction concerning the occupation of the farm at *Searby*.

The argument, drawn from such dispositions of property by a testator, is at variance with the principle of cases, whose authority has never been disputed. In *Foster v. Cooke*, the testator devised all his real and personal estate to trustees, subject to an annuity to his wife, and

(a) *Cro. Eliz.* 128. pl. 13.

(b) 2 *Ves. & B.* 222.

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and he directed them to possess themselves of, and manage and improve, all his real and personal estates. In *French v. Davies* (a), the testator gave his wife certain benefits, and devised to her and two other trustees all his freehold lands, as well in *England* as in *Wales* or elsewhere, upon trust to sell the same as soon as conveniently might be after his death. Yet in neither of these cases was the widow put to her election.

If it be thought that the particular charges on the lands at *Searby*, and the direction given with respect to their occupation, are incompatible with the assertion of a right of dower out of that particular estate, the supposed incompatibility cannot extend beyond those lands, and the widow will still be dowable out of the rest of the property.

June 18.

The LORD CHANCELLOR.

In this cause, the only point to be determined is, whether the widow is to be put to her election between her dower and the provisions given to her by the will of the testator.

The law, upon questions of this kind, is very distinctly and clearly settled. The widow will be entitled to her dower, unless in the will, under which she takes a benefit, there are provisions absolutely inconsistent with her claim of dower. The only doubt, therefore, must be as to the application of that principle; and the question is, whether the provisions of this will are inconsistent or not with the wife's claim of dower?

On the part of the Defendants, the case of *Villa Real v. Lord Galway* (b) was cited, as clearly and distinctly in point.

(a) 2 *Ves. jun.* 572.(b) 1 *Bro. C. C.* 292. note. *Ambl.* 682.

point. On the other side, the case of *Villa Real v. Lord Galway* was impeached by a reference to the cases of *Pitts v. Snowden* (a), *Pearson v. Pearson* (b), *French v. Davies* (c), and *Foster v. Cooke*. (d)

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The case of *Villa Real v. Lord Galway* was decided, after great consideration, by Lord Camden; and it is to be observed that there are circumstances in it, which do not appear in *Pitts v. Snowden*. *Foster v. Cooke* is not, in its principle, at all at variance with *Villa Real v. Lord Galway*. In *Pearson v. Pearson*, which was cited as an authority in opposition to *Villa Real v. Lord Galway*, Lord Loughborough says, "The gift of an annuity to the wife may be a bar of dower, or may not, according to the language of the will; *Arnold v. Kempstead*. In *Villa Real v. Lord Galway* it was held to be a bar; because, otherwise, the other devises in the will could not take effect." He therefore does not impeach the principle of the decision of *Villa Real v. Lord Galway*, but considers it an authority; and the only question in the case before him would be, as to the sufficiency of the circumstances of that case to bring it within the principle. In *French v. Davies*, Lord Alvanley comments on the reasons assigned by Lord Camden, for the construction which he adopted in *Villa Real v. Lord Galway*; and though he considers those reasons not very satisfactory, he does not over-rule the decision. In a recent case, decided in *Ireland*, Lord Redesdale states what he conceived to have been the principle of Lord Camden's decision in *Villa Real v. Lord Galway* (e), and gives it the sanction of his authority. (f) "The result," he says, "of all the cases of implied intention seems to be, that the instru-

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(a) Cited in 1 Bro. C. C. 292.

(b) 1 Bro. C. C. 292.

(c) 2 Ves. jun. 572.

(d) 3 Bro. C. C. 347.

(e) 1 Bro. 292.

(f) 2 Sch. & Lef. 453.

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ment must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds, &c. That is the ground on which Lord *Camden* decided the case of *Villa Real v. Lord Galway*. (a) The case is not clearly reported; but my recollection of the manner in which it has always been treated is, that the claim of the annuity was considered as utterly inconsistent with the claim of dower; that the directions in the will, with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child, were inconsistent with the setting out a third part of the estate by metes and bounds; and therefore Lord *Camden* thought the implication manifest, that the testator did intend the annuity as a provision in lieu of dower." Recollecting thus the language of former judges, I certainly am not in a condition to say, that *Villa Real v. Lord Galway* is not to be regarded as a binding authority.

But it is not necessary that I should decide exactly upon the principle of *Villa Real v. Lord Galway*; because there is a circumstance in this case, which makes the reasons for the application of the principle of election much stronger here than they were in *Villa Real v. Lord Galway*. That circumstance arises out of the latter part of the trust on which the testator has given his property. After devising his real estate generally, he adds, "and upon further trust, that they my said trustees do and shall, during the minority of my said son, occupy and manage the farm now in my own possession, employing a proper person as bailiff to superintend the same." The farm in the testator's own possession was the farm

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(a) *Ambl.* 682.

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at *Searby*; and it formed a very considerable portion of the whole of the property which he held in *Searby*. It was the intention of the testator, therefore, that that farm at *Searby* should be occupied and managed by his trustees, and that they should take possession and hold possession of it. To assign that part of the property for dower, setting it out by metes and bounds, would be inconsistent with such an intention.

It was argued, that, so far as related to the farm at *Searby*, the widow might be excluded from dower, and yet be entitled to have her dower out of the rest of the property. But the clause, to which I have referred, goes on to direct, that the trustees shall “let or manage the residue of my real estates, and receive and take the rents, issues, proceeds, and profits of the whole of my said real estates, and also the interest, dividends, and produce of my personal estate, and of any accumulation thereof, and from time to time lay out and invest the surplus or residue thereof respectively, &c., in order to accumulate for the benefit of my son.” These provisions are similar to the provisions which are adverted to by Lord *Redesdale* as the ground of the decision in *Villa Real v. Lord Galway*. He says, “The directions in the will, with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child, were inconsistent with the setting out a third part of the estate by metes and bounds; and therefore Lord *Camden* thought the implication manifest, that the testator did intend the annuity in lieu of dower.” And Lord *Redesdale* does not find fault with that implication.

I think, therefore, upon the reasoning stated in these cases, and upon the principle to which I have adverted,
that,

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that, in the first place, it is perfectly manifest that the testator did not intend that that part of the property, which was in his own possession at *Searby*, should be subject to the claim of dower; and I also think, from the provisions with respect to the trust on which his other estates are given, that it was not his intention that any part of that property should be subject to dower.

I beg leave further to observe, that the whole of the property is conveyed by one general devise, and we are to ascertain the intention of the testator expressed in this general devise. He gives a direction as to a part of the property, which shows that he did not intend that part to be subject to the claim of dower; and if there is one part of the property, with respect to which it is clear that he did not intend it should be subject to the claim of dower, as the whole of the property is conveyed by one general devise, it follows that he did not intend that any portion of it should be subject to dower. And this view is consistent with what is laid down in the case of *Miall v. Brain* (a), not cited in the argument, which has been recently decided by the Vice-Chancellor. There the property was devised, subject to an annuity of 100*l.* bequeathed to the wife; and the question was precisely that which is raised on the present occasion. The daughter, by the provisions of the will, was to be allowed to occupy a certain house; and the question was, Whether the widow was excluded from her dower? It was contended in that case, as it has been in this, that, though she should be deprived of the right of dower, as far as related to the house which the daughter was to occupy, she would still have her dower out of the rest of her husband's lands and tenements.

(a) 4 *Mad.* 119. 125.

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ments. But, on that point, the Vice-Chancellor made the very same observation which I have now applied to the will before me, — namely, that the whole of the property was devised together in general terms; and if it was manifest that it was the intention of the testator that one part of the property should not be subject to dower, it followed that no part of the property could be considered as so subject. The Vice-Chancellor made use of this language: — “It is truly said, that, if the testator had expressly declared that his daughter should enjoy this house, free from his widow’s right of dower, the widow would still have been dowable out of the rest of his estate. In this case, however, the gift to the daughter is by a direction to the trustees, to permit her to use, occupy, and enjoy this house; and the direction would be in vain, unless he had previously given such an estate to the trustees as would enable them to secure by their permission this occupation and enjoyment. This house is part of a general devise to the trustees of all his real estate, and the testator has not given this house to the trustees, free from the widow’s dower, unless he has so given his whole estate. I think the testator has shown a plain intent, that the trustees should take an interest in this house, which would exclude the widow’s dower; and the same intention must necessarily be applied to the whole estate, which passes by the same devise.”

Therefore, — without meaning to say, that a mere charge of an annuity in favour of the widow, with a clause of entry and distress, would be sufficient to put her to election, — but considering the particular dispositions which the testator has made of his property, the charge of the annuity, the clause of entry and distress, the express direction for the occupation of part of the estate by the trustees, the trusts declared with respect

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to the rents, profits, and issues of the whole of the real estate; — taking all these circumstances together, I think it was the manifest intention of the testator, that the whole of his property should be free from dower; and that intention is so clear and distinct as to authorise me to say, that the widow must be put to her election.*

* See *Butcher v. Kemp*, 5 *Mad.* 61.

March 16.

PRICE v. LYTTON.

A Plaintiff may read evidence to disprove an allegation contained in a passage of the Defendant's answer, which he has read.

THE Plaintiff, in order to prove that certain pieces of glebe land had been let by the Defendant, read the following passage from her answer: "That the Defendant hath let one of the said farms, including part of the said glebe lands, to *Richard Blake*, upon the condition of his giving up the said glebe land when required so to do by the Plaintiff; and that the said Defendant hath let the other farm, including the other part of the said glebe land, to *Joseph Beaumont*, who is ready and willing to give up such glebe land to the Plaintiff."

Part of the case made by the Defendant was, that *Beaumont* was willing to give up that portion of the glebe lands which was in his occupation; and the counsel for the Defendant insisted, that this part of the case was proved by the passage which the Plaintiff had read.

The Plaintiff then proposed to prove by evidence that *Beaumont* was not willing to give up the lands in his occupation.

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Mr. *Horne* and Mr. *Treslove* for the Defendant, contended, that the Plaintiff was not at liberty to disprove a fact which he had chosen to read out of the Defendant's answer.

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Mr. *Shadwell* and Mr. *Bateler* contra.

The MASTER of the ROLLS

Was of opinion, that, by analogy to the practice at law, which permitted a party to disprove a circumstance that had been stated by his own witness, the Plaintiff was at liberty to read evidence to disprove the allegation in the answer, that *Beaumont* was willing to give up the glebe land in his occupation.

1827.

March.
October 30.

WHYTE v. KEARNEY.

By a marriage settlement, a sum of 4000*l.* was to go, after the decease of the husband and the wife and the husband's father, and subject to the father's power of appointment, to the children of the marriage equally; and the real estates of the wife were charged with a sum of 8000*l.*, which was to be divided among

THE question in this cause arose upon the condition of a codicil to the will of *Jane Whyte*.

Mrs. Coghill, by her will, dated in 1791, bequeathed residue of her property to trustees, upon trust to the dividends to the use of *Jane Whyte*, then *Mrs. Mowbray* during her life; and, after her decease, to the use of children of *Jane Whyte*, by her then present or any husband, in such shares, at such times, and in manner, as *Jane Whyte* should by deed or will appoint.

In 1803, *Jane Mowbray*, being then a widow, and having two sons, *George Isaac Mowbray* and *Thomas Mowbray*, by her deceased husband, intermarried with *Whyte*. By the settlement made on that occasion, 4

the children, in such shares and manner as she should appoint. The wife, by her will, appointed 100*l.* to the eldest son of the marriage, and the remaining 7000*l.* to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters on their attaining that age or marriage, with their father's consent; she, likewise, created a further charge, in order that the younger child's share of the 8000*l.* might be augmented to 5000*l.*; and by the instrument she, in exercise of a power of appointment, which she had under the will of *C.*, appointed *C.*'s residuary property to the first and other sons of the marriage who should attain twenty-one; and if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of the marriage who might be delivered, as was given by her will to each of her daughters, and if no son of the marriage should live to attain twenty-one or be married, her daughters should be entitled to have for her fortune 10,000*l.*, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving one son and three daughters her surviving; and in the events which happened, the only surviving children of the marriage, became entitled under the marriage settlement to the 4000*l.*, and, under their mother's appointment, to the residuary property of *C.*: Held,

That they were entitled to receive 10,000*l.*, exclusive of, and in addition to the shares of the 4000*l.* and of the residuary property of *C.*

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secured by a bond of the father of *John Whyte*, to be paid within twelve months after the father's decease, was assigned to trustees upon trust for *John Whyte* for life; and after his decease, for *Jane Whyte*, then *Mowbray*, for life; and, after the decease of the survivor, for their children, in such shares and on such conditions as *John Whyte* should appoint, and in default of appointment, for the children equally. The shares of sons were to be paid at twenty-one; the shares of daughters, at their respective ages of twenty-one years or days of marriage, which should first happen; provided that such times of payment should not arrive during the respective lives of the husband, *John Whyte*, or of the wife or of the husband's father.

By the same settlement, also, certain real estates of *Jane Whyte* were conveyed to trustees, upon trust to pay, during her life, the rents and profits to her as therein mentioned; and after her decease, to pay thereout 600*l.* a year to *John Whyte*; and, subject thereto, to the use of the trustees for a term of a thousand years; and, subject as above mentioned, to such uses as *Jane Whyte* should appoint; and, in default of appointment, to the use of her heirs and assigns. The term of a thousand years was declared to be upon trust, in case there should be issue of the marriage one child, to raise 5000*l.* for his or her portion; if two, three, or four children, to raise the sum of 8000*l.*; and if five or more children, the sum of 10,000*l.*, for all or such one or more of such children, and in such shares, and to vest in, and be paid to them respectively, at such times as *Jane Whyte* should appoint; and for want of such appointment, to be divided equally among them; the shares of sons being, in that case, to vest at twenty-one, and the shares of daughters, at twenty-one, or marriage, which should first happen.


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Jane Whyte, by her will dated in *September 1807*, stating that there were then two children of the marriage, — a son, *John Robert Whyte*, and a daughter, *Jane Anne Whyte*, — and that she was therefore entitled to direct 8000*l.* to be raised under the trusts of the term of a thousand years, appointed 100*l.*, part of the 8000*l.*, to her son *John Robert Whyte*, and the residue of the 8000*l.*, among all her children by *John Whyte*, (except the eldest son of the marriage, *John Robert Whyte*,) who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age, or be married with the consent of *John Whyte*. By the same will, a term of two thousand years was vested in trustees, upon trust to raise such sum or sums of money as would make the portions, which her children by *John Whyte* (except the eldest son) would become entitled to in the sum of 8000*l.*, amount to 5000*l.* each. Subject to these charges, the estate was devised to her son *John Robert Whyte* for life, with remainder to his first and other sons in tail male; remainder to *George Isaac Mowbray* for life, and then to his first and other sons in tail male; remainder to *Thomas Mowbray* for life, and then to his first and other sons in tail male; remainder to the testator's daughters by *John Whyte*, as tenants in common in tail.

The testatrix also by her will, in exercise of the power which she had under the will of *Jane Coghill*, appointed 100*l.* to each of her sons by her former marriage; 50*l.* to her daughter *Jane Ann Whyte*; a like sum to each of her children by *John Whyte* thereafter to be born. The residue of the property she appointed to *John Robert Whyte*, in case he attained twenty-one; but in case he should die under that age, to any other of her sons by *John Whyte*, in like manner; and, in the event of her having no son by *John Whyte* who should live to attain the age of

of twenty-one years, to such of her daughters by *John Whyte* as should live to that age.

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In the year 1809, about eighteen months after the date of the will, the testatrix, having in the interval had a second daughter, published a codicil, by which, after stating that “she was then *enceinte*, and that she was desirous of making a provision for such child or children of which she might be delivered,” she, “by virtue of all and every the powers and authorities enabling her in that behalf, did, by the codicil to her will, order and direct, that the same fortune should be given to such child or children as was given by her will to each of her daughters, and be payable and paid in the same mode, manner, and form, to all intents and purposes, as were in such her will mentioned, expressed, and declared, of and concerning the fortunes thereby given unto each of such daughters : and she further ordered and directed, in case no son of hers, by her then present husband *John Whyte*, should live to attain the age of twenty-one years, or be married previous to that period, that thereupon each of her daughters, present and future, should be entitled to have and receive for her fortune the sum of 10,000*l.*, to be payable and paid in the manner and at the respective times mentioned or expressed in her marriage-settlement, or in her will, respecting the fortunes of such daughters, or as near thereto as circumstances would permit.”

After the date of the codicil the testatrix had two children. She died in *February* 1811, leaving one son and three daughters. The son, *John Robert Whyte*, died in *December* 1813, aged seven years ; *Christiana*, a daughter, died in 1818, at the age of eleven years. Of the two surviving daughters, one, *Jane Anne*, had at-

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tained her full age; the other, *Mary Anne*, was still an infant.

John Whyte died in *May* 1821, without having made any appointment of the 4000*l.* secured by the bond of his father. This sum, upon his father's death, had been paid to the trustees of the settlement, who invested it in the purchase of 3952*l.* new 4 per cent. annuities.

Under these circumstances, as there was no son of *Jane Whyte* and *John Whyte* who attained twenty-one, the two surviving daughters became entitled, — the elder, absolutely — the younger, presumptively, — under the appointment contained in their mother's will, to the residuary estate of *Jane Coghill*, and, under the settlement, to the 4000*l.*


The bill was filed by the two surviving daughters: and it prayed a declaration that *Jane Anne White*, on attaining twenty-one, became entitled absolutely, and that *Mary Anne White* was entitled presumptively, each to a fortune of 10,000*l.*, to be raised out of the property comprised in the settlement of 1803, and exclusive of their interests in *Jane Coghill's* residuary estate, and in the stock purchased with the 4000*l.*

The question was, Whether the sums of 10,000*l.*, to which the eldest daughter was, and the younger, on attaining twenty-one, would be entitled, was inclusive or exclusive of their respective shares of the 4000*l.*, and of *Jane Coghill's* property?

Mr. Sugden and *Mr. Bickersteth*, for the Plaintiffs.

The settlement had provided a sum of 8000*l.* to be raised out of *Mrs. Whyte's* real estates, as portions for the

the younger children. Mrs. *Whyte* by her will directed, that the share of each of them in the 8000*l.* should be augmented to 5000*l.* This sum of 5000*l.* was exclusive of any interest which they might take in the 4000*l.* or in *Jane Coghill's* residue. The 10,000*l.* provided by the codicil is plainly a substitution for the 5000*l.* given by the will; and, like it, therefore, must be a distinct and independent gift. It is the sum which they were each to receive out of the mother's own property.

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The 4000*l.* could not be included in the bequests of 10,000*l.*; for no child could be entitled to receive any part of the 4000*l.*, till after the death of the wife, the husband, and the husband's father; whereas the fortunes of the daughters were to vest in them at twenty-one or marriage, and had no reference to the time at which the father of *John Whyte* might die.

Neither could the shares of the daughters in Mrs. *Coghill's* residuary estate be included in the bequests of the 10,000*l.* Their interest in that fund was contingent, depending on the event of their having no brother who should attain twenty-one, and could not be considered as a component part of a specific sum, which they were to take, whether that event happened or not. The state of circumstances contemplated by the testatrix was, not that Mrs. *Coghill's* property should make part of the fortunes of the daughters, but that the bulk of it should be enjoyed by a son.

Mr. *Shadwell* and Mr. *Skirrow*, *contra*.

When the testatrix directs, that, on a certain event, each of her daughters shall be entitled to receive 10,000*l.* for her fortune, the meaning, which it is most natural to put upon the words, is, that their respective fortunes shall be made up to that amount. The testatrix refers

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to the marriage-settlement, so that she must have had the 4000*l.* in contemplation. In her will she appoints Mrs. *Coghill's* property; therefore, the interests of her daughters in these two funds must have been present to her mind. She could not have forgotten, that, if no son attained twenty-one, they were to take the great mass of Mrs. *Coghill's* residuary estate. Her object was to secure to her daughters a provision of a definite amount; and it is not a natural construction of her language to fix this amount without reference to large and valuable interests, given them by her own express appointment, in this very will, or by instruments to which she here refers.

There might have been some weight in the argument on the opposite side, if she had directed, that her daughters should each have the 10,000*l.* immediately upon her decease. But the direction has reference to a distant time, and depends, among other things, on the event of there being no son who should attain twenty-one; in which case the testatrix had herself provided that Mrs. *Coghill's* property should go to the daughters. In fixing the time when they are to become entitled to the 10,000*l.*, she alludes both to her will and to her marriage-settlement.

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The question is, what the testatrix meant to comprehend under the terms "shall be entitled to have and receive for her fortune:" whether she intended them to include, first, the share of the 4000*l.* which the children might be entitled to by the settlement and the appointment of *John Whyte*, her husband; and, secondly, the property which she divided among them, under the power for that purpose given by the will of Mrs. *Coghill*.

I think

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I think the testatrix did not intend to include the share of the 4000*l*. The interest of this sum was to be paid to the husband for life, and after his death, to the wife for life in the event of her surviving him, and after the death of the survivor, the principal was to be divided among the children as the husband should appoint. Over this fund the testatrix *Jane Whyte* had no control. There is nothing to lead to the conclusion, that the testatrix had the money, which might be eventually derived from this source, in her contemplation, when her will and codicil were made. In directing that in certain events each of her daughters should be entitled to receive for her fortune 10,000*l*., I conceive she had reference to her own will and codicil alone, and to what each of the daughters would be entitled to receive under the dispositions which they contained, and that she did not intend to include what they might receive from any other quarter. I think, therefore, that the share of the 4000*l*. forms no part of the 10,000*l*. mentioned in the codicil.

I entertain the same opinion with respect to the property bequeathed by the will of Mrs. *Coghill*. In the first part of the codicil the testatrix orders and directs, that the same fortune should be given to the child or children of which she was then pregnant, as was given by her will to each of her daughters, and that it should be payable in the same manner as was directed with respect to the fortunes thereby given. I think the testatrix here meant to refer to what she had given from her own property, and not to what she had appointed under the power conferred by the will of Mrs. *Coghill*. She had by her will declared, that her children, with the exception of *John Robert Whyte*, should have 5000*l*. each under her will. She had by the same instrument, in exercising the power of appointment given her by the will of Mrs. *Coghill*,

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hill, postponed the daughters to the sons. The children of the testatrix by *John Whyte*, both sons and daughters, were, with the exception of *John Robert Whyte*, upon an equality with respect to the portions from her estate. They were not so, when the disposition of *Mrs. Coghill's* property was included; the sons were preferred. It is not probable that the testatrix intended by the codicil to alter an arrangement made apparently with so much deliberation. When, therefore, she gives to the expected child the same fortune which she had given by her will to each of her daughters, she must, I think, have had reference only to what they were to take from her own property. For, if the child, of which she was then *enceinte*, had been a son, and *John Robert Whyte* had died under twenty-one, such child, which by the codicil was to be on a footing with the daughters, would, if *Mrs. Coghill's* property were included, have taken more than a daughter; or the arrangement made by the will must have been entirely changed.

If I am right in this view of the case, the testatrix has herself explained what she meant by the term "fortune" in the first part of the codicil, and has shewn, that she did not intend that it should apply to the property bequeathed by *Mrs. Coghill*. When, therefore, in a few lines afterwards, she uses the same term, and directs that in certain events the daughters should have and receive for their fortunes the sum of 10,000*l.*, I think the term must be taken in the same sense, unless there be some strong reason to the contrary. I cannot discover any such reason; and I think therefore that her intention was merely to increase to 10,000*l.* the portions which she had before made up to the sum of 5000*l.*, and that she did not mean to include in the 10,000*l.*, the benefit taken under the will of *Mrs. Coghill*.

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1828.

August 19.

1829.

January 27.

CROWDER v. STONE.

JOHN LLOYD by his will, dated the 27th of April 1787, after mentioning in a preceding clause a nephew *John Lloyd*, and four nieces, *Mary Powell*, *Jane Greenwood*, *Ruth Matthews*, and *Catherine Mitchener*, gave a sum of 1100*l.* four per cent. Bank annuities, and 700*l.* three per cent. Bank annuities, to his executors upon trust, to pay the dividends to his wife during her life, and after her decease, to his brother during his life. The subsequent disposition of these two sums of stock was contained in the following words: — “ And from and after the decease of my said wife *Catherine*, and my said brother *Edward Lloyd* and the survivor of them, my will is, that the said sums of 1100*l.* and 700*l.* shall be sold by my said trustees or the survivor of them, or the executors or administrators of such survivor; and the produce or money arising therefrom, shall be paid to and equally divided between my said nephew and nieces hereinbefore mentioned, share and share alike; and my mind and will further is, that, in case of the death of my said nephew, or of any or either of my said nieces, without lawful issue, before their respective parts or shares of the said sums of 1100*l.* and 700*l.* shall become

A testator gave stock to trustees, to be divided, after the death of two persons who had life-interests in it, among *A.*, *B.*, *C.*, *D.*, and *E.* in equal shares; and he directed, that, if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue should go to, and be equally divided among, the survivor and survivors of them. *A.* died, leaving issue, who were living at the time fixed for the distribution of the fund: then *B.*

died, leaving a son, who died without issue, before the period of distribution; shortly afterwards, and also before the period of distribution, *C.* died without issue: Held,

That *B.*'s personal representative was not entitled to any portion of the fund:

That the one third of *B.*'s share, which, on the failure of her issue, survived to *C.*, did not, on *C.*'s death, survive to the other legatees, but was transmitted to her personal representative:

That the words “ survivor and survivors,” were to be construed in their natural sense, and not as equivalent to “ other and others,” so that no part of the shares of *B.* and *C.* went over to *A.*'s personal representative.

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due and payable to them under and by virtue of this my will, then the part or share of him, her, or them, so dying without issue as aforesaid, shall go to and be equally divided between and amongst the survivor and survivors of them, share and share alike."

The testator died shortly after the date of his will. His wife survived his brother, and died in 1823: at which time, out of the five legatees — the nephew and the four nieces — *Ruth Matthews* alone was alive. *Mary Powell* died in *July* 1797, leaving an infant son, who died without issue in 1799. *Catherine Mitchener* died in *August* 1797, and *John Lloyd* the nephew, in 1805, both of them leaving children who were still alive. *Jane Greenwood* died in 1802, without issue.

Three questions were made at the hearing: —

First — Whether, *Mary Powell* having left issue at the time of her death, but that issue having become extinct before the time fixed for the distribution of the fund, the share given to her belonged to her personal representative, or passed to the surviving legatees.

Secondly — If *Mary Powell's* share did not vest in her personal representative, but in the events which happened, passed, under the ultimate gift, to the survivor and survivors, whether, that proportion of it which had accrued to *Jane Greenwood*, vested, upon the death of the latter, in her personal representatives, or went over along with her own original share.

Thirdly — Whether the personal representative of *Catherine Mitchener*, who died before the failure of issue of *Mary Powell*, and also before the death of *Jane Greenwood*

wood, was entitled to a share of the shares originally given to *Mary Powell* and *Jane Greenwood*, or whether the shares, which passed by the ultimate gift, went only to such of the five individual legatees as were surviving at the time when the accruer happened.

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Mr. *Russell*, for the Plaintiff, who was the personal representative of the testator.

Mr. *Horne* and Mr. *Evans*, for the personal representative of *Catherine Mitchener*.

Mr. *Pepys* and Mr. *Tinney*, for the executors of *Ruth Matthews*, who died after the institution of the suit.

Mr. *Koe*, for the executors of the nephew, *John Lloyd*.

Mr. *Bickersteth*, for the personal representative of *Mary Powell*.

Mr. *Loyd*, for the personal representative of *Jane Greenwood*.

I. — On the first point, it was argued on behalf of the personal representatives of *Catherine Mitchener*, *John Lloyd*, and *Ruth Matthews*, that “*dying without issue*” means, in general, an indefinite failure of issue; and such, they said, is the interpretation which must be put upon these words, unless there is something in the will to restrict their import. Here there is an express restriction, which limits the failure of issue to the period of the lives of the testator’s brother and widow; and that restriction gives validity to the ultimate bequest. If, therefore, at any time during the life of the brother or the widow, there is a failure of issue of any of the five legatees, the event has occurred

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occurred in which the share of that legatee is given over ; and it matters not that, at the time of the legatee's death, the failure of issue had not taken place. Here there is nothing to restrict the meaning of the words " death without issue," to " dying without issue living at the time of the legatee's decease." The restriction is of quite a different kind, and refers to a period altogether different. *Hughes v. Sayer* (a), *Nicholls v. Hooper* (b), *Forth v. Chapman* (c), *Massey v. Hudson* (d), *Beauclerk v. Dormer* (e).


For the personal representative of *Mary Powell*, the argument was, that the legacy had vested in *Mary Powell*, and was not to be divested out of her, except in the event of her dying without issue before the period of distribution arrived. She did die before that time, but she did not die without issue ; on the contrary, she died with issue. The words were to be construed according to their plain and natural import : and there was no reason for extending to a bequest of personalty technical rules of interpretation, derived chiefly from principles applicable only to real estate.

II. — On the second point, in support of the proposition, that the proportion of *Mary Powell's* share, which accrued to *Jane Greenwood*, went over on the death of the latter, as well as her own original share, to the surviving legatees, it was contended that the two sums of stock constituted an aggregate fund which was to be divided at a given time among certain legatees, with benefit of survivorship among them ; and in such

a case

(a) 1 *P. Wms.* 534.(b) *Ibid.* 198. 2 *Vern.* 686.(c) *Ibid.* 607. 663.(d) 2 *Mer.* 130.(e) 2 *Atk.* 308.

a case the accrued share of a deceased legatee survives, as well as the original share.* *Worlidge v. Churchill* (a), *Pain v. Benson* (b).

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For the representative of *Jane Greenwood* it was argued, that the general rule was, that a clause of survivorship did not operate upon accrued shares, becoming vested in individuals who were the survivors for the time being, unless it was extended to such acquired shares by specific words, or by manifest indication of intention on the part of the testator; and that the mere circumstance of a fund being given to a number of persons as tenants in common would not take the case out of the general rule. Even in *Pain v. Benson* (which, however, had been disapproved of by Lord *Thurlow* (c)), Lord *Hardwicke* admitted the rule, saying (d), “Where a man gives a sum, suppose of 1000*l.*, to be divided amongst four persons, as tenants in common; and that if one of them die before twenty-one, or marriage, it shall survive to the other: if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainder but the second’s original share, for the accruing share is as a new legacy, and there is no further survivorship.” Here there are no special words to extend the clause of survivorship to the accrued as well as the original shares. The consequence is, that, on the failure of issue of *Mary Powell*, either one-fourth or one-third of her share (according as the representatives of *Catherine Mitchener* shall be admitted to or excluded from the benefit of the clause of survivorship) became vested in *Jane Greenwood*.

(a) 5 *Bro. C. C.* 465.

(c) 1 *Bro. C. C.* 576.

(b) 3 *Atk.* 78.

(d) 3 *Atk.* 80.

* *Barker v. Lea*, 1 *Turn. & Russ.* 415.

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Greenwood, and, on her death, was transmitted to her personal representative. *Rudge v. Barker (a)*, *Perkins v. Micklethwaite (b)*, *Ex parte West. (c)*

III. The representatives of *Catherine Mitchener* claimed her proportion of the two original shares of *Mary Powell* and *Jane Greenwood*, and also of the supposed accrued shares of the latter, on the ground that, according to the principle of *Wilmot v. Wilmot (d)*, *survivor and survivors* ought to be construed "other and others," or "legatees not dying without issue before the time specified."

On the other hand, it was contended, that "survivor and survivors" must be confined to such of the individuals mentioned as survived the person on whose death the gift over came into operation; and that those words never received the construction of "other or others," except under particular circumstances, and where there was a sufficient indication of a purpose in the testator which could not be otherwise accomplished. *Milsom v. Awdry (e)*, *Doe v. Wainwright. (f)*

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August 19.

The LORD CHANCELLOR.

"Death without lawful issue" denotes generally an indefinite failure of issue. But in this case a time is limited, within which the failure of issue is to take place, and that is the time when the fund is to become divisible, and the shares are to be paid. *Mrs. Powell* had a son, who was living at the time of her death in 1797; but

(a) *Cas. temp. Talb.* 124.

(b) 1 *P. Wms.* 274.


(c) 1 *Bro. C. C.* 575. 1 *P. Wms.* 276. note.

(d) 8 *Ves.* 10.

(e) 5 *Ves.* 465.

(f) 5 *T. Rep.* 427.

but that son died without issue in 1799, during the lifetime of the testator's widow, and, consequently, before the period when the shares of the stock became due and payable. Under these circumstances, I am of opinion that *Mary Powell* took nothing under this will.

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The next question relates to the share of *Jane Greenwood*. As she survived the son of *Mary Powell*, she would become entitled to her proportion of *Mary Powell's* share; and though she died before the time when the shares became payable, and though, therefore, her original share would become divisible among the survivors, yet, on the authority of *Ex parte West* and that class of cases, the share which accrued to her would not go over.

The LORD CHANCELLOR.

1829.
 January 27.

There was a third point argued in this cause, on which I omitted to give judgment. It was contended that the words, "survivor and survivors of them," were to be construed "other and others." That is a construction which the Court has, in some cases, put upon those or similar words; but it is what Lord *Eldon*, in *Davidson v. Dallas*, calls a "forced construction of the term survivor (a)," and he contrasts it with what he calls its "natural meaning." It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in *Wilmot v. Wilmot* it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to

(a) 14 *Ves.* 578.

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to me, that the words "survivor and survivors" are here to be taken in their natural meaning. The shares which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively. The representative of *Mitchener* is not entitled to any part of them.

Mrs. *Matthews* and her husband had assigned her share of the fund by way of mortgage. Though her husband died before his wife, and during the life of the testator's widow, the mortgagee insisted on having the benefit of this assignment.

Mr. *Matthews*, for the mortgagee.

The Lord Chancellor held, on the principle of *Purdie v. Jackson* (a), and *Honor v. Morton* (b), that this assignment had no operation against Mrs. *Matthews* surviving her husband.

(a) 1 *Russell*, 1.

(b) See *supra*, 65.

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FITZROY v. HOWARD.

March 21.

1828.

Dec. 11.

CHARLES FITZROY SCUDAMORE, by his last will, bearing date the 1st of *April* 1762, and executed and attested in the manner required by law for passing freehold estates, gave and devised unto his daughter *Frances Fitzroy Scudamore*, and the heirs of her body lawfully issuing, all and every his lands, tenements, and hereditaments whatsoever, situate and being in the several counties of *Middlesex, Hereford, and Gloucester*, any or either of them, and all other his real estate in the kingdom of *England* or elsewhere, either in possession, reversion, or expectancy; and for default of such issue of his said daughter, he gave and devised the said several estates unto the Honourable *Charles Fitzroy*, brother of the Duke of *Grafton*, and the heirs and assigns of the said *Charles Fitzroy* for ever.

A testator, seised of estates in fee, and holding certain lands and tithes in the county of *H.* under church-leases for lives, devised all his lands and hereditaments in the counties of *H.* and *G.*, and all other his real estate, to his daughter and the heirs of her body; and for default of such issue, to *F.* and his heirs. The daughter, at the testator's death, and ever afterwards, was of unsound mind. Her husband, having taken out administration to the testator, with the will annexed, procured, from time to time, renewals of the leases. She survived him, as well as all the

The testator died in 1782.

By an indenture bearing date the 28th of *May* 1750, the then Lord Bishop of *Hereford* demised and granted unto *Charles Fitzroy Scudamore* certain premises called the *Grainge*, and *Grainge* tithes, to hold the same to the said *Charles Fitzroy Scudamore*, his executors, administrators, and assigns, for the lives of him *Charles Fitzroy Scudamore*, *Francis Barnes*, and *Robert Keyse*, and the life of the longest liver of them. By another indenture of the same date the bishop demised and granted

certain *que vie* named in the testator's leases, and died without issue, and without having done any act to bar such interest as *F.* had under the devise. Held,

That the leaseholds for lives passed by the will: and,

That *F.* was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases.

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granted unto *Charles Fitzroy Scudamore* the rectory and parsonage of *Bridstow*, with the appurtenances, to hold the same to the said *Charles Fitzroy Scudamore*, his executors, administrators, and assigns, for the lives of the Princess *Amelia*, the said *Charles Fitzroy Scudamore* and *Horatio Walpole*, and the life of the longest liver of them. At the date of his will, and thence up to and at the time of his death, *Charles Fitzroy Scudamore* was under those leases, seised of or entitled to the demise premises. He was likewise seised of other freehold hereditaments in fee.

Frances Fitzroy Scudamore, named in the will, intermarried during her father's life with the Earl of *Surrey* afterwards Duke of *Norfolk*. She was in a state of mental derangement at the time of the testator's death and administration of his personal estate, with his will annexed, was granted to her husband. Renewals of the two leases were obtained by the Duke of *Norfolk*, in which he was described as administrator of *Charles Fitzroy Scudamore*; but the fines of renewal were paid with his own money.

On the 1st of *September* 1810 the Duke executed a deed, by which, — (after reciting that he, as the husband of *Frances Fitzroy* Duchess of *Norfolk*, was by the rights of marriage entitled to all her personal estate and that, as some question might arise, in case the Duchess should survive him, concerning the right to the several leasehold estates granted to the lessee, his executors, administrators, and assigns during certain lives and the life of the survivor, which *Charles Fitzroy Scudamore* had been entitled to at the time of his death he, the Duke, was desirous that the same leasehold estate should be considered and be his own absolute property,) — it was witnessed, that he, the Duke of *Norfolk*
bargained

bargained, sold, and assigned the leaseholds to *Henry Howard*, his executors, administrators, and assigns, upon trust for the Duke, his executors, administrators, and assigns. Some subsequent renewals took place.

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The Duke died in 1815, having appointed *Henry Howard* his executor. The Duchess died in *October* 1820, without issue; and it was admitted in the answer, that she had not done any act to bar the quasi estate tail alleged to have been created by her father's will in the leaseholds for lives. All the *cestuis que vie* named in the leases, which were subsisting at her father's death, died before her.

The Plaintiff derived his title under *Charles Fitzroy*, to whom the testator, in default of issue of his own daughter, had limited over his estates: and the prayer of the bill was, that he might be declared entitled to the leaseholds for lives.

The Defendant *Charles Howard* claimed the leaseholds under the indenture of the 1st of *September* 1810, and as executor and devisee of the Duke of *Norfolk*; insisting that they vested in the Duke and Duchess as personal estate, and not under the devise in her father's will, and that the Duke, as administrator, and by virtue of his marital right and the acts done by him, became entitled to them absolutely.

Mr. *Sugden* and Mr. *Norton*, for the Plaintiff, contended, that the interest in these leaseholds, being a freehold interest, would pass under the general terms used in the will of the testator; that the Duchess of *Norfolk* was under the devise *quasi* tenant in tail, and, no act having been done by her to bar either her issue or the remainder-man, the limitation over took effect on her

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death without issue; that the Duke could not, by surrendering the old leases and taking renewals, affect the rights either of the issue of the Duchess or of the remainder-man; and that the renewed leases must belong to those who would have taken the original leases, had they been still subsisting, subject to what might be due for the fines that had been paid.

Mr. *Preston* and Mr. *Bickersteth* raised the following points on behalf of the defendant: —

First. The leaseholds did not pass by the will of *Charles Fitzroy Scudamore*. For some purposes a leasehold for lives granted to a man, his executors, administrators, and assigns, is considered as freehold estate, or rather as *quasi* freehold estate; but not even in the lessee is it freehold estate in the proper sense of the term; for the circumstance that the interest, by the terms of its original creation, is limited to executors and administrators, gives it a quality which is incompatible with the nature of a freehold: and, in any hands except those of the lessee, such leaseholds are personal estate. Therefore, though the words in the will might be sufficient to pass freeholds for lives, properly so called, they will not pass such leaseholds as these. Besides, the creation of an estate tail with a remainder over, shews, that the testator had in contemplation the lands of which he was seised in fee. He could not mean to apply such a mode of limitation to a perishable interest of this nature: it was not his intention, that these leaseholds should pass; and, therefore, they will not pass, even if the words were sufficient to include them. When the testator gave “his lands, tenements, and hereditaments,” in certain counties, and “all *other* his real estate,” the use of the word “*other*” shews, that the lands and hereditaments, which he had in view, were lands and hereditaments answering the description

description of *real estate*; and surely the character of real estate cannot be attributed to leaseholds limited to executors and administrators.

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Secondly. As all the *cestuis que vie*, named in the leases to which the testator was entitled, died in the lifetime of the Duchess, the subject, which the testator had to dispose of, ceased to exist, before any claim could have been made under the ultimate limitation: and the person, who might perhaps have been entitled in remainder, if the interest had continued, cannot, after its extinction, set up any claim.

Thirdly. The Duke was not bound to renew the leases: if they had not been renewed, the Plaintiff could have made no complaint, and there would have been nothing for him now to claim. The Duke had a right to renew the leases for his own benefit, for he did not thereby do injury to any one: he has renewed them expressly for his own benefit, and his representatives are alone entitled to the existing leases.

The authorities cited were *Ripley v. Waterworth* (a), *Watkins v. Lea* (b), 2 Roll. Abr. 151. R. 2, 3., *Duke of Devon v. Kinton* (c), *Duke of Devon v. Atkins* (d), *Low v. Burron* (e), *Sheffield v. Lord Mulgrave* (f), *Milner v. Lord Harewood* (g), *Day v. Trigg* (h), *Rose v. Bartlett* (i), *Thompson v. Lawley* (k).

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| (a) 7 Ves. 425. | (g) 18 Ves. 259. |
| (b) 6 Ves. 633. | (h) Cro. Car. 292. |
| (c) 2 Vern. 719. | (i) 1 P. Wms. 286. |
| (d) 2 P. Wms. 380. | (k) 2 Bos. & Pull. 303. 5 Ves. |
| (e) 3 P. Wms. 262. | jun. 476. |
| (f) 2 Ves. jun. 526., and | |
| 5 T. Rep. 571. | |

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The LORD CHANCELLOR.

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1828.

December 11,

The first question is, Whether the leaseholds, which the testator held under the Bishop of *Hereford*, passed by the devise? That such leaseholds are freehold estates, being estates for lives, is perfectly clear: they pass only by a will attested according to the provisions of the statute of frauds; and all the authorities shewing that they are freeholds, from *The Duke of Devon v. Kinton* down to the present time, are collected in the elaborate judgment of Lord *Eldon* in *Ripley v. Waterworth*. Indeed, in the discussion at the bar, it was admitted that they were freeholds in the lessee, though the word *quasi* occasionally crept in. If they are freeholds in the lessee, they are freeholds also in the executor, if he takes them as special occupant; but though he takes them as freeholds, yet, according to the opinion of Lord *Eldon* in the case to which I referred, he takes them as a trustee for the individual entitled to the personal estate.

If they are freeholds, they will pass by the description of *lands and hereditaments*, the words used in this will. That does not rest on mere general assertion; because the very point was made by counsel in the case of *Watkins v. Lea (a)*, that, under a devise of all the devisor's freehold estates, or a general devise of lands, an estate held for lives would pass; and the Court assented to that opinion, confirming it not merely by a short statement, but, according to the habit of Lord *Eldon*, by a train of observations connected with the subject. These estates, therefore, being freehold, passed by the description of lands and hereditaments, or would pass by that description.

In the argument on this point a number of cases were cited, which do not appear to me to be very closely appli-

(a) 6 Ves. 636—642.

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applicable to the present question. I allude to such cases as that of *Rose v. Bartlett* (a), where it was held, that, if a man, having lands in fee and lands for years, devises all his lands and tenements, the fee-simple lands alone pass, and not the leases for years. But that doctrine is confined to leaseholds for years, and there is neither authority nor principle to extend it to leaseholds for lives. I therefore put that class of cases, *Rose v. Bartlett*, *Day v. Trigg, &c.* (b), entirely out of my consideration.

Reliance was placed upon the words "other his real estate," which, it was said, imported, that, under the term "lands," the testator meant real estates; and that, though these leaseholds are freeholds, it does not follow that they are real estates. In the first place, I do not admit that it necessarily follows from the construction of the clause, that by the term "lands" the testator must have meant real estates; but if he did so mean, as the interest in question is a freehold estate in lands, I should wish to have some authority to satisfy me, that it is not to be considered, in the hands of the lessee at least, as real estate.

It was further contended, that, although these estates might pass by the words used in the will, yet, if there was an intention on the part of the testator that they should not pass, that intention must be carried into effect.

It is perfectly clear, that, though these words were sufficient to pass an estate of this description, the Court, if there was any thing on the face of the will to shew that

(a) *Cro. Car.* 292.

(b) 1 *P. Wms.* 280.

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that it was not intended that they should pass, would not consider them as passing. The *onus* of proving that intention is upon the party who contends for the exception. Now, the single circumstance, which is relied upon for the purpose of establishing the intention, that in this case the leaseholds should not pass, is the nature of the limitations: and it is said that the limitations are not applicable to an estate of this description. It is, however, perfectly certain, that, in practice, estates of this description are very often passed with such limitations; and that such limitations may be applicable to estates of this description nobody can doubt. In fact, that point came before the Court in *Low v. Burron* (a); and the Court was of opinion, that such limitations were in point of law applicable to an estate of this description. In the case of *Sir John Sheffield v. Lord Mulgrave* (b), where the question was as to the intention, one circumstance, not relied upon, but mentioned by the Court, was the nature of the limitations, which limitations were in the nature of an estate tail. But the Court did not decide the case upon that circumstance. Lord *Kenyon* selected another circumstance, which, according to his phrase, was decisive of the intention that the leasehold property for lives should not pass; and it was on the ground of that particular circumstance, (whether properly or improperly selected, it is unnecessary to say), manifesting a decisive intention, that it was considered that the leasehold for lives in that case did not pass.

It does not appear to me that there is any case, or any authority whatever to shew, that the mere circumstance of a limitation of this description is a sufficient indication

(a) 3 P. Wms. 262.

(b) 2 Vcs. jun. 526. 5 T. R. 571.

indication of intention that leaseholds for lives should not pass under a general devise similar to that which is the subject of the present inquiry. I am therefore of opinion, that, so far as relates to this point, the leaseholds did pass by the devise to *Charles Fitzroy Scudamore*.

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It was admitted at the bar, and is admitted in the cause, that nothing was done by the Duchess of *Norfolk* to bar this estate tail, or *quasi* estate tail. The next question for consideration, therefore, is with respect to the operation of the renewals.

The leases were renewed by the husband. It is said he was not bound to renew. I admit that he was not bound to renew. According to the doctrine in *Milner v. Lord Harewood*, the husband was not bound to renew; and no other person, Lord *Eldon* said (*a*), could renew for the benefit of the wife, so as to bring a charge on her rents and profits during the coverture. But if there is, in fact, a renewal by the husband, the question is, on whose account and for whose benefit is that renewal to operate? In *Milner v. Lord Harewood*, Lord *Eldon* said, that it was very questionable whether the wife should have the benefit of the renewal, and that it might be fairly contended, the renewal should be, in equity, for the benefit of all persons claiming under the settlement. But that turned entirely upon the particular circumstances of that case; and the very exception taken by Lord *Eldon* establishes the rule, that, — if those circumstances had not existed, — if that case had been an ordinary case, like the one now before the Court, — it would have been considered, that the parties, who were entitled to

(*a*) 18 *Ves.* 280.

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to the original lease, would have been entitled to benefit of the renewals.

I am of opinion, therefore, upon the whole case, the party who claims under *Charles Fitzroy*, that is present plaintiff, is entitled to the benefit of the renewals.

Of course an account must be directed with respect to the fines of renewal on the one side, and the renewal of rents on the other, since the death of the Duke of *Norfolk*.

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DAWSON v. THORNE.

March 21.
July 18.

THE will of *Richard Thorne* began in the following manner: — “Considering the uncertainty of life, and having two poor sisters, in particular, to provide for, I now sit down with an intent to make my will in their favour.” Then, after mentioning that his property consisted of 2800*l.*, navy 5 per cent. stock, and of one sum of 100*l.*, and another of 30*l.*, both of which he had lent out, the testator proceeded as follows: — “This is all that I have to dispose of, and I dispose of it in the manner following: — my sister *Elizabeth* is old, and wants a great deal of attention to be paid to her; and my sister *Fanny*, who is subject to fits, also wants a great deal of attention to be paid to her; — I must therefore leave the bulk of my fortune to this *Elizabeth* and *Fanny*. My will, therefore, is, that *Elizabeth* and *Fanny* shall have 2400*l.*, the interest of which will be 120*l.* a year; and, when one of them dies, the other shall enjoy it all as long as she lives.”

A testator, beginning his will by expressing an intention to give the bulk of his property to two of his sisters, gave them only a life interest in the greater part of it; and, after giving legacies to others of his sisters, he expressed his wish, that *A.*, and his, the testator's, servant *B.* should be his executors, and that *B.* should live with his two sisters, and take care of them and their property; and by a codicil, he directed that the interest of 300*l.* should be paid to *B.* half-yearly, as wages for

He next gave 300*l.* of the navy 5 per cent. stock, and the 100*l.* which was out on loan, to his sister *Martha Pierce*; the remaining 100*l.* of stock, in trust for another

taking care of his two sisters; and that, after the death of *B.* and his two sisters, the 300*l.* should be paid to *P.*: Held,

That the legacy given to *B.* by the codicil was not a legacy given to her for her care and trouble, so as to convert her into a trustee of the residue for the next of kin, but that *A.* and *B.*, in their character of executors, took the residue beneficially:

That, after the death of the two sisters, though the services for which the legacy was given as wages could no longer be performed, *B.* would still be entitled to the interest of the 300*l.* during her life.

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other sister, *Sarah Thorne* ; and the 30*l.*, to a fifth sister, *Mary Ayling*.

The will concluded with these words:—“ I wish my servant, *Mary Burton*, and *Thomas Dawson* to be my two executors. I wish my servant *Mary Burton* to live with my sisters *Elizabeth* and *Fanny*, and to provide for them as she did in my lifetime, — *Mary Burton* receiving the interest of the money which I leave to *Elizabeth* and *Fanny*, and laying it out to the best advantage for them.”

On the other side of the same sheet of paper there was another testamentary writing, in the form of a letter to *Dawson*, signed by the testator, and dated in *November 1818*:—“ Dear *Dawson*,—I have in my will left you and *Mary Burton* my two executors. What you used to pay me half-yearly, you will now pay to *Mary Burton*, as wages for looking after my two poor sisters *Elizabeth* and *Fanny*. When *Mary Burton* is too old for service, you must get *Kitty Toms*, or some other steady, good sort of a person, to look after them. When *Mary Burton* and *Elizabeth* and *Fanny* are dead, let my sister *Martha* have it all.”

The testator at his death left his five sisters named in his will, and also a sixth sister, him surviving.

Dawson admitted, that, at the date of the will and at the time of the testator's death, he, *Dawson*, was indebted to the testator in a sum of 300*l.*, for which he paid him interest half-yearly.

As *Fanny* and *Elizabeth* took only a life-interest in the 2400*l.* five per cent. stock, and as there was no express gift of the residue, the principal question was, whether

whether the executor and executrix took that residue, including the reversionary interest in the 2400*l.* stock, beneficially, or as trustees for the next of kin.

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Mr. *Temple*, Mr. *Lovat*, and Mr. *Lynch*, for different parties in the cause.

On behalf of the sisters, who were the next of kin, it was argued, that, though the testator had not, in express terms, called *Dawson* and *Mary Burton* trustees, the tenor and phraseology of the will shewed, that it was far from being his purpose to make them the principal objects of his bounty ; and that, in his own apprehension, he was imposing on them a labour and a duty, instead of bestowing a favour. He declares, that he sits down to make his will in favour of two of his sisters, to whom, he says, he must leave the bulk of his fortune: his sisters appear throughout to be the principal objects of his bounty. The appointment of executors is in these words:—“ I wish my servant, *Mary Burton*, and *T. Dawson* to be my two executors.” That is not the phraseology in which a man bestows the bulk of his fortune ; but it is the very language in which the testator, in the next clause, imposes a burdensome duty on this executrix.

The circumstance, moreover, of the clause, in which he wishes *Mary Burton* to be his executrix, being followed immediately by the words in which he completes the expression of the purpose he had in view, by stating his wish that she should live with his sisters and take care of them and their income, shews, that the office of executrix and the superintendence of the personal comfort and of the property of his two sisters were identified in his mind. Therefore, when by the letter, which has been proved as a testamentary paper, he gives her
 a legacy

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a legacy as a remuneration for the discharge of the duties he had thus imposed on her, he, in effect, gives her a legacy for her care and trouble. Then, on the principle of *Rachfield v. Careless* (a), *White v. Evans* (b), and similar cases, *Mary Burton* becomes a trustee of the residue for the next of kin; and if one of two executors is a trustee, the other must be so too.

For the Plaintiff and *Mary Burton*, it was answered that the expressions in the will, which had been relied upon by the next of kin, indicated only the purpose of the testator to provide for his two sisters, *Fanny* and *Elizabeth*, and to make a complete disposition of the whole of his property: and the latter part of this purpose would not be accomplished, if he were held to have died intestate as to the beneficial interest in the residue. The provision for *Fanny* and *Elizabeth* was clearly only for life; and, indeed, from the circumstances of their situation, and their apparent incapacity to manage their own income, the testator could not rationally have intended to give them more than a life-interest. There was nothing in the tenor or language of the will, to convert the executor and executrix into trustees.

The burden which the testator had imposed on *Mary Burton*, was not a part of the duty of an executrix. She might have proved the will, and acted as an executrix, without performing towards his sisters the services which the testator had requested her to perform. The benefit given to her by the codicil was expressly stated to be wages for those expected services; and, therefore, could not be considered as given to her for her care and trouble in the office of executrix.

Another

(a) 2 P. Wms. 158.

(b) 4 Ves. 21.

Another point raised was, Whether *Mary Burton*, in the event of her surviving *Elizabeth* and *Fanny*, would still be entitled to have the interest of the 300*l.* due from *Dawson*, paid to her, though the services, in respect of which that interest was given to her, would necessarily, by that time, be at an end.

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The LORD CHANCELLOR.

July 13.

There is nothing in the frame or language of this will to lead me to consider, that it was the intention of the testator to confer merely the office, and not any beneficial interest, on the executor and executrix. The only question, therefore, is, Has any legacy been left, either to the executrix or executor, for his or her care and trouble in carrying the will into effect? For there is no doubt, that a legacy given to an executor for his care and trouble converts him into a trustee; and where there are two executors, if one becomes a trustee, the other must be a trustee also.

In this case the interest of a debt due from *Dawson* is given to *Mary Burton*, and is given to her as wages for a particular service she was requested to perform. She had long acted as the servant of the testator's two sisters; during his life she had been paid wages for her service; and he was desirous that she should continue to attend upon his sisters, and receive wages as before. I do not think that the provision thus made, with respect to the interest of the debt due from *Dawson*, can be considered as a legacy given to *Mary Burton* for her care and trouble as executrix. That is the only circumstance, upon which an argument could be founded for converting the executor and executrix into trustees for the next
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of kin; and, therefore, *Dawson* and *Mary Burton* will take the residue beneficially.

It may be proper to observe, that, after the death of *Elizabeth* and *Fanny*, *Mary Burton*, if she survives, will be entitled to the interest of the 300*l.* during her life; for it is not till after the death of *Mary Burton*, and the testator's sisters, *Elizabeth* and *Fanny*, that this sum of 300*l.* is to go over to *Martha Pierce*.

REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY.

GIDDINGS *v.* GIDDINGS.

ROLLS.

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Dec. 1. 2.

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and before the year 1763, one *Sutton* held the manor, prebend, and parsonage of *Potterne*, under a lease for years granted by the Bishop of *Salisbury*: a part

If a tenant for life of an underlease for eighteen years, granted by a person

himself holds the premises so underlet, along with other property, under a lease for twenty-one years, purchases the interest of his immediate lessor, and from the superior lessor a renewal of the lease thus purchased, the renewed lease subject, so far as regards the premises which were comprised in the underlease, to the same trusts, as would have affected the underlease, if it had not been expired or had not expired by the effluxion of time.

The same rule holds, though the lease at the time of the purchase was vested in a tenant for life upon trusts, under which he could not have granted a renewal of the lease, and though the tenant for life outlived, by twenty-five years, the time at which the underlease would have expired by effluxion of time.

A tenant for life of a leasehold for years, with remainder to *B.*, after the death of the tenant for life, bequeathed to him the leasehold during his life, with remainder over, and gave him also the residue of his real and personal property. *B.* took possession of the residuary estate; suffered a recovery of the lands to him in tail; acted as the absolute owner of the leasehold estate, and continued the term for which the lease was granted, having previously acquired a new lease in the demised premises: Held, that *B.* elected to take under the will, and was bound to give effect to the devise of the leasehold in favour of the remaindermen.

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part of the premises comprised in this lease, called the *Byde* leasehold, was demised by him to *James Harris* for a term of twenty-one years: and *Harris*, by indenture dated the 25th of *March* 1763, demised part of the premises comprised in the *Byde* leasehold, and distinguished by the appellation of the *Byde Mill*, to *John Giddings* for a term of eighteen years, at a yearly rent of 3*l.* 10*s.* In 1770, and afterwards in 1777, *John Giddings* obtained from *Harris* renewals of his lease for terms of eighteen years. None of the leases of the *Byde Mill* contained any covenant binding the lessor to grant, or the lessee to accept, a renewed lease; but they appeared, as well as *Harris's* lease of the *Byde* leasehold, and *Sutton's* immediate lease under the bishop, to have been from time to time renewed on payment of a fine at the end of every seven years.

In the meantime, *John Giddings*, on the 4th of *April* 1767, had executed a settlement, by which he assigned his leasehold interest in the *Byde Mill*, to trustees upon trust for himself during his life, and, after his death, for his son *John Giddings* absolutely; and he covenanted, that, in case any further term should be obtained in the premises, such further estate should be held upon the same trusts.


In *July* 1780, *John Giddings* the elder made his will, by which he devised "all that leasehold estate, commonly known by the name of the *Byde Mill*, together with its rights, privileges, and appurtenances," to his son *John Giddings* during his life; with remainder over, first to his son *Thomas Giddings*, and then to his grandson *Thomas Giddings*, during their respective lives; and after the deceases of these persons, he gave the same to his grandson *John Giddings* for the residue of his, the testator's, term, estate, and interest therein. The testator likewise

likewise devised an estate at *Allington* to his son *John Giddings* and the heirs of his body: and he further bequeathed the residue of his real and personal estate to him, his heirs, executors, and administrators, and appointed him his executor. The testator died in the same month.

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John Giddings, the son, entered into possession of the *Byde Mill*; and, in 1784, a deed was executed, purporting to be a renewal of the lease for eighteen years from that time. This renewal, however, turned out to be of no avail; for *Harris*, by indentures of settlement dated the 6th and 7th of *October* 1777, had assigned the *Byde* leasehold, along with other property, to Sir *George Cornwall* upon certain trusts: and, though, under the clauses of the settlement, the trustee had a power of sale, there was no power to enable any person to grant a renewed lease of any part of the premises comprised in the *Byde* leasehold. In 1784, Sir *George Cornwall* obtained from *Sutton* a renewal of the lease of the *Byde* leasehold for a term of twenty-one years; and, some time afterwards, the lease was offered for sale. *John Giddings* became the purchaser: and, in exercise of the power of sale created by the settlement of 1777, *Cornwall* and *Harris*, by indenture dated the 6th of *September* 1788, assigned the *Byde* leasehold for the residue of the term of twenty-one years to *John Giddings* the son.

After this purchase, *John Giddings*, the son, from time to time renewed the term in the *Byde* leasehold. The last of the renewals was by an indenture dated the 1st of *April* 1819, by which the immediate lessee of the manor, prebend, and parsonage of *Potterne*, under the Bishop of *Salisbury*, in consideration of the surrender of a former lease, and the payment of a fine

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of 272*l.* 14*s.* 6½*d.*, demised the *Byde* leasehold to *John Giddings* for a term of twenty-one years, commencing from the preceding 26th of *March*, at the yearly rent of 5*l.*

Shortly afterwards, *John Giddings*, the son, died, having by his will devised all the term and estate, which he should have in the *Byde* leasehold at the time of his death, to his son *John Giddings* the Defendant, who also took under the will other property, which his father *John Giddings* had become entitled to under the residuary devise and bequest of *John Giddings* the grandfather. *John Giddings* the son had, in his lifetime, suffered a recovery of the *Allington* estate; and he devised it to *James Giddings*, a brother of the Defendant, and not a party to the suit.

Thomas Giddings the son, and *Thomas Giddings* the grandson, died in the lifetime of *John Giddings* the son; and the present Plaintiff, *John Giddings* the grandson, upon the death of *John Giddings*, the son, claimed, under the ultimate bequest of the leasehold, contained in the will of *John Giddings* the grandfather, to be entitled to the *Byde Mill* for the residue of the existing term of twenty-one years in the *Byde* leasehold, subject to the payment of a proportion of the rent and fine. He, by his bill, insisted that *John Giddings* the son, having possessed and enjoyed the *Allington* estate, and the other property devised to him by the will of *John Giddings* the grandfather, had elected to take under that will, and therefore was bound to make good the disposition, which it contained, of the *Byde Mill*, and that the Defendant also, by possessing and enjoying property derived under the same will, became bound to give effect to the devise of the *Byde Mill*. The prayer was, that it might be declared, that the lease
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of the 1st of *April* 1819, so far as it included the *Byde Mill*, was and ought to be held upon the trusts of the will of *John Giddings* the grandfather — that the Defendant, upon receiving a rateable proportion of the fine paid on obtaining the lease, might be compelled to assign to the Plaintiff the mill and premises, and the residue of the term therein, subject to a just proportion of the rent reserved — that it might be declared, if necessary, that *John Giddings* the son had elected to take under the will of *John Giddings* the grandfather, and became bound to make good or confirm his bequest of the *Byde Mill*, and that the Defendant had also become bound to make good and confirm that bequest — or, if the Court should be of opinion that no definitive election had been made, then that the Defendant might be put to his election; and that all necessary accounts might be taken, in order to ascertain the property given by the will of *John Giddings* the grandfather to or for the benefit of *John Giddings* the son, and also the past rents, interest, and profits, and produce thereof; and that the Defendant might be compelled to assign and transfer the same, in order to indemnify the Plaintiff for the disappointment of the bequest of the *Byde Mill*.

The Defendant, by his answer, insisted, that, under the settlement of 1767, *John Giddings*, the son, was entitled, after the death of his father, to the leasehold interest in the *Byde Mill* absolutely; that the devise of it by the will of *John Giddings*, the grandfather, was inoperative; that *John Giddings*, the son, had not made any election; and that the Plaintiff had no right to have put him, or to put the Defendant, to elect. He also insisted, that the term of years in the *Byde Mill* had become merged and extinguished, when the term in the whole of the *Byde* leasehold was acquired by *John Giddings*, the son; that *John Giddings*, the son, had from

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time to time obtained renewals of the entirety of the *Byde* leasehold, by virtue of the several covenants of the immediate lessee of the bishop with the lessee of the *Byde* leasehold; and that he was entitled to the *Byde* leasehold in his own right, and was not a trustee, as to any part of the premises, for the Plaintiff or any other person.

June 23.

The case was argued, first before Lord *Gifford*, by Mr. *Heald* and Mr. *Tinney* for the Plaintiff, and by Mr. *Sugden* and Mr. *W. H. Ludlow* for the Defendant: and, judgment not having been pronounced at the time of his lordship's death, it was again argued at the Rolls, before Sir *J. S. Copley*, by Mr. *Shadwell* and Mr. *Tinney* for the Plaintiff, and Mr. *Sugden* and Mr. *J. Russell* for the Defendant.

Dec. 1, 2.

The counsel for the Plaintiff contended, that, according to *James v. Dean* (a), following *Taster v. Marriott* (b), *Rawe v Chichester* (c), and other cases, the settled doctrine of the Court is, that, where a tenant for life, a trustee, or an executor, renews a leasehold interest, the new lease is subject to the same trusts on which the former lease was devised. If *John Giddings* the son, who was both tenant for life and executor, had taken a new lease of the *Byde Mill*, the Plaintiff would unquestionably have been entitled to a decree: and what has been done, amounts, in substance, to a renewal of the lease of the *Byde Mill*, whether it be so in form or not. At the death of *John Giddings* the son, there was a leasehold interest in the *Byde Mill* existing

(a) 11 *Ves.* 385. 15 *Ves.* 236. (c) *Ambl.* 715. 1 *Bro. C. C.*
 (b) *Ambl.* 668. 198. n.

existing in him : must he not, therefore, be a trustee of this interest for the purpose of giving effect to the devises in the will of *John Giddings* the grandfather? What difference does it make, that this leasehold interest comprises other lands, besides those on which the equity of the Plaintiff attaches, and that it exists by virtue of a lease from the immediate lessee of the church, and not, as formerly, by a lease from the tenant of that lessee? Suppose that *John Giddings* the son had died, after his purchase in 1788, and before the time when the term granted by the lease of 1777 would have expired, can it be doubted that his executors would have been compelled to grant a new lease of the *Byde Mill*?

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Randall v. Russell (a) and *Hardman v. Johnson* (b) will probably be cited on the other side. But in those cases, the tenant for life of the lease acquired the reversion in fee, and not an extension or continuation of the lease; and the decisions proceeded on the ground, that the fee was a totally different subject from that partial interest on which the trusts attached. Perhaps, too, the authority of these two cases is not altogether above suspicion. The tendency of Sir *W. Grant's* mind was, to narrow and circumscribe pure equities, and rather to look to the legal effect of instruments and transactions, than to control them by the peculiar doctrines of this Court. The same habits of thought, which led him, in *Butcher v. Butcher* (c), and *Bar v. Whitbread* (d), to adopt, on the subject of illusory appointments, a doctrine which Lord *Eldon* rejected (e) as inconsistent with all antecedent authorities, and to refuse, in *James v. Dean*,

(a) 5 *Mer.* 190.

(b) 3 *McCr.* 347.

(c) 9 *Ves.* 582.

(d) 10 *Ves.* 31.

(e) 16 *Ves.* 55. 1 *Ves. & B.* 79.

Sugden on Powers, 490—495.

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Dean, to sustain an equity which was afterwards enforced on appeal from his decree, would naturally incline him to the conclusion to which he came in *Hardman v. Johnson* and *Randall v. Russell*. There is the more reason for questioning the authority of the latter case, because the judgment rests principally on *Norris v. Le Neve* (a), which, when properly examined, has no bearing on the question.

If the Plaintiff would be entitled to relief, in case *John Giddings* the grandfather had, at the time of his death, been absolute owner of the lease of the *Byde Mill*, it is no answer to his claim, that, by the settlement of 1767, the whole interest in the lease, subject to the life-estate of the grandfather, became vested in *John Giddings* the son, and that, therefore, the grandfather had no power to devise it. By the same will which devised this leasehold, large benefits were given to *John Giddings* the son; those benefits he accepted and enjoyed: part of the property, which he took absolutely under that will, he has given to the present Defendant; of the *Allington* estate he suffered a recovery, and devised it to *James Giddings*. Having thus elected to take under the will, he is bound to give effect to all the dispositions which it contains, and to relinquish every inconsistent right.

The counsel for the Defendant argued, that there was no ground for alleging that any election had been made by *John Giddings* the son. In order to constitute election, a party must have a knowledge of the inconsistency of his different rights, and of their respective value; and there must be in his mind an intention to elect between them. *Lord Beaulieu v. Lord Cardigan*. (b)

“ I c

(a) 5 *Alk.* 26.

(b) *Amb.* 533.

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“It seems difficult,” says Sir *Thomas Plumer* in *Dillon v. Parker* (a), the question being, whether Sir *Henry Parker* had elected, “to prove all the circumstances necessary to constitute an election; that Sir *Henry* was apprized of the necessity of electing; that, knowing that he could not hold both the property to which he was previously entitled, and that which was given to him by his son, he voluntarily abandoned the former, and took the latter. That he proved the will of his son, and entered on the estates devised to him, is not sufficient. Did he not exercise dominion over his own estates, as if the son had not devised them? Taking both estates, enjoying that which was his own, and also that given to him by his son, how can it be said that he relinquishes the one and elects to take the other? Has he not rather elected to take both?” And it was there held, that Sir *Henry Parker* had not made any election. The observations of Sir *Thomas Plumer* apply to the present case; and with the more strength for this reason, that *John Giddings* the son could not have been required to make any election during his life, and it might have happened, that there never would exist a state of circumstances, in which he could be called upon to elect. He was entitled to occupy the *Byde Mill* during his life, and to retain all the benefits given him by the will; there was no obligation on him to renew the lease of the *Byde Mill*; there was no certainty that a renewal could be obtained; and the existing term of eighteen years would expire in 1795, which was very likely to be within the limits of his own life. In fact, the settlements of the *Harris* family made it impossible to renew the term: the lease of the *Byde Mill* never was renewed; and the term, which was devised by the will of *John Giddings* the grandfather,

(a) 1 *Swanst.* 379.


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father, expired long before the death of *John Giddings* the son. To hold that a party has made an election, when he was not, and never might be, bound to elect, would be to step beyond the limits of all previous authorities ; more especially as the acts, which are supposed to constitute an election, are, to say the least, of a most equivocal nature. *John Giddings*, it is true, suffered a recovery of the *Allington* estate, and acted as the absolute owner of it, and of the other property devised to him by the will of *John Giddings* the grandfather. But a party, even when bound to elect, is not, by suffering a recovery, considered as having made his election, *Welby v. Welby. (a)* Besides, *John Giddings* acted, also, as having the complete ownership of the lease of the *Byde Mill* : he never renewed the term, but became the purchaser of the entirety of the *Byde* leasehold, which he dealt with and devised as being absolutely his own.

The Plaintiff has been aware, that *John Giddings* the son could not be held to have made an election ; and he therefore prays that the Defendant may now be put to elect, and asks compensation out of the property which *John Giddings*, the son, took under the will of *John Giddings* the grandfather. If we are successful in contending, that, in the events which have happened, a case of election did not arise against *John Giddings*, the son, of course those, who claim under him, cannot be required to elect. But it would be a waste of time to inquire, whether the Plaintiff is entitled to this species of relief ; because, supposing him entitled to it, he has not before the Court the persons between and against whom such an equity must be administered — The most valuable part of the property, which *John Giddings* —

(a) 2 V. & B. 200.

Giddings the son took under the will of the grandfather, has been devised to *James Giddings*, who is not a party to the suit.

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If the Plaintiff succeeds in making out that *John Giddings* either did elect, or, in the events which happened, was bound to elect, the second question arises, — Whether the subsisting leasehold interest in the *Byde* leasehold, so far as it regards the premises comprised in the former lease of the *Byde Mill*, is subject to a trust for the Plaintiff as the ultimate remainder-man under the will of *John Giddings* the grandfather? The grounds, on which a renewed lease, obtained by a tenant for life, becomes subject to the trusts of a will disposing of the original lease *, are — that the one is merely an extension or continuation of the other; that it was the situation of the party as tenant for life, which gave him the opportunity of acquiring the renewed interest; and that, in obtaining the renewed lease, he acquired or defeated some right or interest of the persons in remainder. Now, neither is the rule itself, nor are any of the grounds on which it is established, applicable here. In all former cases, in which a renewed lease has been held to be subject to the trusts of the original lease, the Court found an existing interest, which was the continuation of a former interest; and it merely subjected that existing interest to certain trusts. Here it must begin by creating a leasehold interest in the *Byde Mill*, apart from the other premises comprised in the *Byde* leasehold. The subsisting leasehold interest is not a renewal of the lease which was devised, and, in no sense of the words, is it a continuation or extension of that lease; on the contrary, it is a continuation and extension of a lease for twenty-one years, in exist-

* See the observations of Sir W. Grant in 5 *Mcr.* 197, 198.

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existence at the time of *John Giddings's* death, which comprehended, along with other property, the reversion of the *Byde Mill*, expectant on the determination of the term of eighteen years. The subsisting lease is held of the lessee of the bishop; the devised lease was held of a person who derived a partial interest under the bishop's lessee; the one is for a term of twenty-one years, and is subject to a yearly rent of 5*l.*; the other was for a term of eighteen years, at a rent of 3*l.* 10*s.*; and the covenants in the two leases are altogether different.

It is the situation of a person as actual tenant, which enables him to obtain a renewal of his lease. For if a lessor intends to continue to demise lands belonging to him, the person, who is in possession as tenant, will naturally have a preference. But the occupation of the *Byde Mill* did not give *John Giddings* the son a similar advantage in the purchase of the more extensive interest which was vested in his lessor. In making that purchase he acquired no right — defeated no interest — of the devisees under the grandfather's will. He was not bound to renew the term of the *Byde Mill*, if it had been possible to do so; and the settlements of the *Harris* family had rendered renewal impossible, because there was no person who had power to demise any part of the premises comprized in the *Byde* leasehold. If a stranger had purchased the *Byde* leasehold, the remainder-men under the will of the grandfather could not have set up a claim against him; and they lose nothing in consequence of the purchase being made by the tenant of the *Byde Mill*; for the lease, in which they had an interest, would have expired, by effluxion of time, in 1795.

The Court, if it holds that the existing lease of the *Byde* leasehold is subject to a trust for the Plaintiff, will not only step beyond the limits of decided cases, and deviate

deviate from the principle, on which the equity attaching upon renewed leases rests, but will act in direct opposition to two decisions of Sir *William Grant*. *Randall v. Russell* (a) and *Hardman v. Johnson* (b) establish the rule, that the immediate reversion in fee, purchased by a tenant for life of a preceding leasehold interest, is not subject to the trusts on which that lease was devised; and those decisions proceeded — not on any peculiarity in the nature of a reversion in fee, as distinguished from a reversion for a term of years,—but simply on the ground, that the purchase of the reversion was not an extension or continuation of the preceding lease, and did not defeat any right of the remainder-man. Yet in *Hardman v. Johnson*, the reversion in fee had been vested, before the purchase, in a corporation; so that the purchase necessarily took away that probability of renewal, amounting almost to a species of tenant right, which a lessee under a public body usually has. If, therefore, *John Giddings* the son, had purchased the reversion in fee of the *Byde Mill* alone, it is clear that the Plaintiff would have been without a shadow of claim in a court of equity; and surely a lease for a term of twenty-one years, comprehending, along with the reversion of the *Byde Mill*, various other lands, and other hereditaments not held of the same lessor or under the same covenants as the *Byde Mill*, is a subject as totally different from the lease devised by *John Giddings* the grandfather, as the mere reversion in fee of the *Byde Mill* would have been. Suppose that the term in the *Byde* leasehold had been for a thousand years, instead of twenty-one years, must not the thousand years have been regarded, so far as the claim of the Plaintiff is concerned, in the same light as the fee? and can there be an equity against the purchaser

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(a) 3 *Mer.* 190.

(b) 3 *Mer.* 347.

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chaser of a lease for a short term, which would not have existed, if the term of years had been long? In fact, the process of re-creating the lease of the *Byde Mill* out of the reversion in fee, would have been easier, than to carve it out of the *Byde* leasehold. What the Plaintiff asks is the benefit of the subsisting lease, so far as it relates to the *Byde Mill*. If that be given him, what he receives is in every respect different from, and better than, any interest in the premises which the testator possessed or had it in his contemplation to acquire or dispose of; while, on the other hand, the reversionary interest of the owner of the *Byde* leasehold in the *Byde Mill* is destroyed, and he will remain bound by covenants which extend to the *Byde Mill*, after the whole of his interest in the *Byde Mill* shall have been, by the act of this Court, transferred to another person. The Plaintiff may, perhaps, propose to indemnify the lessee of the *Byde* lease—hold against his covenants, so far as they relate to the *Byde Mill*; but the very necessity of an offer of indemnity proves, that he is demanding something very different from what was devised to him.

Mr. *Shadwell*, in reply.

Though the trustee, under the deed of 1777, had no power to grant a lease, the property might have been conveyed, under the power of sale, to a purchaser who would have been able, and might have been willing, to renew. If the lease of 1777 had been suffered to expire by effluxion of time, and the tenant for life had not acquired an interest in the property, the remainder-man would have been without remedy, because the subject of the devise would have been exhausted. But that lease did not expire in 1788; it was merged by the act of the tenant for life; and, as he at the same time acquired a further interest in the *Byde Mill*, such interest became subject to the trusts of the testator's will. Possessing the power of continuing the

the existence of the lease of the *Byde Mill*, he was bound in equity to exercise that power for the benefit of the remainder-man.

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The MASTER of the ROLLS.

1827.
 Feb. 1.

In 1763, and previously to that year, the manor, prebend, and parsonage of *Potterne* were held by *James Sutton* as lessee for years under the Bishop of *Salisbury*: in the same year, *Sutton*, by a lease which was merely a renewal of a former lease, demised a part of these premises, distinguished by the name of the *Byde* leasehold, to *Harris* for twenty-one years: and *Harris*, about the same time, demised the *Byde Mill*, which was part of the *Byde* leasehold, to *John Giddings*, the grandfather of the present Plaintiff, for a term of eighteen years. All these leases were from time to time renewed. In 1777, *Harris* conveyed his interest in the *Byde* leasehold to *Sir George Cornwall* on certain trusts; and, at the expiration of seven years from that time, a renewed lease was granted by *Sutton* to *Cornwall*. In 1780, *John Giddings* made his will, whereby he devised his interest in the *Byde Mill* to his son *John Giddings* for life; remainder to the testator's son, *Thomas Giddings*, for life; remainder to the testator's grandson, *Thomas Giddings*, for life; remainder to his grandson, *John Giddings* the Plaintiff. In the same year the testator died; and *John Giddings*, the son, took possession of the *Byde Mill*, and, being in possession, entered into a contract with *Sir George Cornwall* and *Mr. Harris* for the purchase of their interest in the *Byde* leasehold. The purchase was completed; and *John Giddings*, the son, from time to time renewed the lease of the *Byde* leasehold, under the lessee of the bishop, up to 1819, when the last renewal mentioned in the pleadings took place. In 1820 he died, having bequeathed

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queathed his interest in the *Byde* leasehold to the Defendant *John Giddings*. After his death, *Thomas* the son and *Thomas* the grandson being both dead, the present Plaintiff claimed to be entitled, under the limitations of the will of 1780, to so much of the *Byde* leasehold as had been comprised in the demise of the *Byde Mill*. He said that, substantially, the term in the *Byde Mill* had been renewed by the tenant for life, and that, where a tenant for life of a leasehold interest renews, the renewal so obtained enures for the benefit of those in remainder. It is to enforce this claim, that the present bill is filed.

In answer to the case thus made by the Plaintiff, it was contended on the part of the Defendant, that *John Giddings*, the grandfather, had no power to bequeath the *Byde Mill*. He had executed in his lifetime an indenture, by which that property was settled on himself for life, with remainder to *John Giddings* his son absolutely; and, therefore, he had no interest in it which he could dispose of by will.

In reply to this it was stated, that *John Giddings*, the grandfather, was, at the time of his death, the owner of certain freehold property called the *Allington* estate, which he by the same will devised to *John Giddings*, the son, in tail; that *John Giddings*, the son, entered into possession of the property, suffered a recovery of it, and devised it; that he had by those acts elected to take under the will, and it was therefore incumbent on him to give effect to all the dispositions contained in that instrument. And it was further contended, that there was other property which *John Giddings* the son took under that will, and which, at this moment, is actually held, under a title derived from him, by the present Defendant; and that, even if *John Giddings*

Giddings the son had not made an election to take under the will, the present Defendant was, at all events, bound to make his election.

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I am of opinion that an election was made by *John Giddings* the son; that the settlement, made by *John Giddings* the grandfather, must be left out of the question; and that the rights of those parties must be determined in the same way as if no such settlement had ever existed.

John Giddings, the son, was in possession of the *Byde Mill*. If he had merely renewed the lease of the *Byde Mill*, the benefit of that renewal would have belonged to the present Plaintiff. But it is said that he did not renew the lease of the *Byde Mill*. He purchased the right of his lessor, and took a new lease of the *Byde* leasehold, which comprehended the *Byde Mill* and other property, from the immediate lessee of the Bishop of *Salisbury*. The first question then is, Whether, where a tenant for life of a leasehold estate renews the lease, and there is comprehended in the renewed lease some other property in addition to the premises previously demised, the claim of the person in remainder will be thus defeated? In my opinion, the addition of other property could not have interfered with or impaired the rights of the persons in remainder. If *John Giddings*, the son, had taken from Mr. *Harris's* family, not a renewed lease of the *Byde Mill* alone, but a lease of the *Byde Mill* and other property, the person in remainder would be entitled to the benefit of that lease, so far as it extends to the *Byde Mill*.

Having now gotten rid of the circumstance, that the existing lease is a lease of other property, as well as of the *Byde Mill*, the case resolves itself into this; — if

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an under-lessee, who has only a life estate in his lease, instead of taking a renewed lease, purchases the interest of an immediate lessor, and obtains from the superior lessor a renewal of the lease which he has so purchased, will he, under such circumstances, be entitled to the property absolutely? That state of things falls within the general rule; the mere circumstance of the lease being taken, not from the immediate lessor, but from a superior lessor, cannot defeat the right of a remainderman; and the remainder-man will still be entitled, on the principle that a lease, obtained by a tenant for life, enures for the benefit of all in remainder. What difference can it make in the application of that principle, whether the lease be taken from the immediate lessor or from a superior lessor? If *John Giddings* had obtained a renewal of the lease from the family of *Harris*, that renewal would have enured for the benefit of all claiming under the limitations in the grandfather's will: here is a lease of the same property, which has been obtained from the lessor of *Harris*: how can the trusts, to which it is subject, be varied by the circumstance of its being granted by the superior lessor, without the intervention of a mesne tenant?

It is said there are cases in point, establishing a contrary principle: and *Hardman v. Johnson*, and *Randall v. Russell*, both decided by Sir *W. Grant*, have been cited in support of the assertion. If I thought those cases established a contrary principle, I should feel myself bound by the decisions. But I do not think they establish a contrary principle. These were cases in which the reversion in fee was purchased; and there was no longer a leasehold interest existing. In this case, the leasehold interest exists in the identical premises. It therefore falls within the general principle.

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It is a satisfaction to me to know, from a note in the handwriting of the late Master of the Rolls, that he entertained the same opinion and on the same grounds. The case, he said, was not taken out of the general principle, by the addition of other property to the *Byde Mill*, nor by the circumstance that the existing lease was obtained, not from the immediate reversioner of the lease of the *Byde Mill*, but from the superior lessor of the *Byde* leasehold.

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The following decree was drawn up : —

“His Honor doth declare that *John Giddings*, the son, elected to take under the will of *John Giddings* the grandfather, and thereby became bound to make good, out of his interest in the *Byde Mill* and in the premises held therewith under the indenture of settlement of the 4th of *April* 1767, the bequest in the said will mentioned of the said *Byde Mill* and premises : and his Honor doth declare that the lease of the 1st of *April* 1819, so far as respects the said *Byde Mill* and the premises held therewith, ought to be held upon the trusts of the said will ; and that, upon and from the decease of *John Giddings* the son, the Plaintiff became entitled to the benefit of the said lease and the residue of the subsisting term therein, so far as respects the last mentioned premises, subject to the payment of a rateable proportion of the fine paid by *John Giddings* the son, for the renewal of his interest in the said premises — regard being had, as well to the proportion in value, which the *Byde Mill*, and the premises held therewith, bear to the whole estate purchased by the said *John Giddings* the son, called the *Byde* leasehold, as also to the period of enjoyment

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by the said *John Giddings* the son, under such renewal, with interest at 4 per cent.; — and subject also to the payment of the yearly rent of 3*l.* 10*s.*, being the ancient accustomed rent paid by the lessee of the *Byde Mill* and the premises held therewith: and his Honor doth order and decree, that the Master in rotation do ascertain and certify what is the amount or proportion of the fine or fines paid by the said *John Giddings* the son, in respect of the *Byde Mill* and the premises held therewith, for the number of years subsisting and unexpired in the said *Byde* leasehold and premises at the time of his decease; and that it be referred to the said Master to compute compound (a) interest at 4 per cent. on such proportion of fine or fines, from the times of the several payments thereof up to the death of *John Giddings* the son, for which purpose the Master is to make yearly rests: and it is ordered that the Master do ascertain and certify the balance of such principal and interest at the death of *John Giddings* the son, and compute interest on such balance at the like rate, from the death of *John Giddings* the son, up to the date of his report: and it is ordered that the master take an account of the rents and profits of the said *Byde Mill* and the premises heretofore held therewith, from the decease of *John Giddings* the son, up to the time of his report: and it is referred to the said Master to approve of a proper assignment, to be executed by the Defendant to the Plaintiff, of the subsisting term and interest, under the lease of the 1st of *April* 1819, in the *Byde Mill* estate and premises, and to approve of a proper deed of indemnity to be executed by the said Plaintiff against the payment of the yearly rent of 3*l.* 10*s.*, and the performance of the covenants contained in the last mentioned lease, so far as respects the said *Byde Mill* and the

(a) See *Nightingale v. Lawson*, 1 Bro. C. C. 440.

the premises last mentioned, if required by the said Defendant."

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The costs of the suit were reserved.

Reg. Lib. 1826. A. 1304.

A petition of appeal was prepared; the parties then entered into a compromise, and the appeal was abandoned.

GOZNA v. The Alderman and Burgesses of
GRANTHAM.

ROLLS.
Feb. 22.

IN 1710, the corporation of *Grantham*, in consideration of upwards of 80*l.*, granted a lease of two messuages for a term of twenty-one years, at a yearly rent of 4*l.*; and they covenanted to grant at all times and for ever, new leases for a like term and at the same rent, on payment of a fine of five shillings. The lease had been renewed from time to time until the year 1814; and the bill was filed by the person entitled to the benefit of the covenant, in order to compel the corporation to grant a renewed lease.

Decree against a corporation to grant a new lease according to a covenant for perpetual renewal, though the whole of the reserved rent had been for many years applied uniformly to one charitable purpose.

The defence made by the corporation was, that the property had been devised to them on charitable trusts, and that the covenant for perpetual renewal was a breach of trust.

The only evidence of the premises being subject to a charitable trust was, that the 4*l.* of yearly rent had been

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long applied in purchasing four blue coats for four poor men of the town of *Grantham*. This application of the money was traced back as far as the year 1769.

Mr. *Horne* and Mr. *Whitmarsh*, for the Plaintiff.

Mr. *Shadwell* and Mr. *Koe*, for the Defendants,

Argued, that, if the rents, so far back as the application of them could be clearly traced, had been applied uniformly to one and the same charitable purpose, it must be presumed that they always had been so expended; that an uniform application of the rents to one charitable purpose was sufficient evidence that the property had been originally consecrated to charity; and, therefore, that the covenant to renew was a breach of trust, and would not be sustained in a court of equity.

The MASTER of the ROLLS thought, that the evidence did not entitle him to presume, that the property was held in trust for a charity in 1710; and he, therefore, gave the Plaintiff a decree for the renewal of the lease, with costs.

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BROWN v. TEMPERLEY.

ROLLS.

March 2.

NICHOLAS TEMPERLEY, by his will, gave and devised, subject to the payment of his debts and legacies, "all his freehold, copyhold, and leasehold estates; and also all other his estate and effects" to trustees, their heirs, executors, and administrators, upon trust, "for such one or more of his children as should live to attain the age of twenty-one years; or should marry under that age with the consent of his, her, or their guardian."

A testator devises the residue of his real and personal estate to such of his children as shall attain twenty-one, or marry under that age, with consent. All the children are entitled, although their interests are contingent, to have allowances, out of the residue, for their maintenance during their minorities.

The testator left six children, who were all under age. There was a small residue of the personal estate, after payment of the debts and legacies: the real estate yielded upwards of 400*l.* a year.

The Master had reported, that there was at present no fund applicable to the maintenance of the children.

The ground, on which he had come to this conclusion, was, that none of the children had a vested interest in any portion of the residuary estate, and that the devises to them were, as yet, wholly contingent.

The only question was, Whether the Court could allow maintenance to the children out of the residuary fund, before their interests became vested?

On the one hand it was said, that, even if the Court could so deal with a contingent legacy, or with a contingent interest in a residue consisting merely of personalty, it could not apply to the maintenance of the

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legatees,

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legatees, or, at least, of such of them as were younger children, the rents and profits of lands, in which they at present had not, and perhaps never might have, any interest. *

On

1826.

Jan.

* M'DERMOTT v. KEALY.

An allowance out of a residue, which was directed to be accumulated, made for the support of a legatee, in the interval between the time when the legatee attained his full age, and the time fixed for the distribution of the accumulated fund.

Bryan M'Dermott, by his will, gave the residue of his real and personal estate to trustees, who were also his executors, upon trust to pay annuities to his widow, and to his son *John M'Dermott*, and his daughter *Anna Ayers*, and, after payment of these annuities, to lay out the residue of the rents and produce of his estate to accumulate until the death of his widow, son, and daughter; and he directed that, immediately after the death of his widow, son, and daughter, and the survivor of them, his trustees, or the survivors or survivor, or the heirs, executors, administrators, or assigns of such survivor, should make sale and dispose of all his freehold, leasehold, and copyhold estates, the stocks and funds which should be then invested and standing in or upon government securities, and all other his securities for money and personal estate, and should pay and divide the proceeds, share and share alike, between and amongst all and every of his

grandchildren, the children of his son and daughter, *John M'Dermott* and *Anna Ayers*, when his said grandchildren should respectively attain his, her, or their respective age or ages of twenty-one years; and in case there should be only one such grandchild, he gave the whole of the said property to such only grandchild. He then declared it to be his intention, that his grandchildren should take their shares, not in right of their father or mother, but by their own right, and according to the number of all his grandchildren who should live to attain their ages of twenty-one years: and in case any of his grandchildren, who should happen to be living at the death of the survivor of the widow, son, and daughter, should afterwards die under the age of twenty-one years, the share of such child or children was to be divided amongst the survivors or survivor of all his grandchildren equally, and be paid to them at the time when their original

On the other hand, *Inclendon v. Northcote* (a) was cited, where the testator devised his real estate, and the residue of his personalty, upon trust to raise 5000*l.* for such of his

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(a) 3 *Atk.* 433, 438.

his trustees should be paid, out of the surplus and profits, including dividends, of his personal estate, after the payment of the before-mentioned annuities, maintenance, in a decent and proper manner, all and sundry child or children, son or daughter, and to place them out in the world, at a suitable and proper price, and should be at the expense of any such reasonable sum of money, for all such child or children, and his trustees should

The trustees were ordered to pay, during the lifetime of his son, *John M'Dermott*, and, upon application, a pre-apprentice fee, not exceeding 100*l.*, on the ap-

prenticing of any of the sons of *John M'Dermott*, when they should be of a proper age to be put out in the world; and no part of the monies so expended upon all or any such child or children, was to be afterwards charged against or deducted from his, her, or their shares or share of the residue.

The testator died in 1814, leaving his widow, son, and daughter him surviving. The son died in 1816, leaving three children all under age. *Elizabeth*, the eldest of these children, had 100*l.* a-year allowed her for maintenance during her minority; and, having now attained her age of twenty-one years, she presented a petition, praying that the same allowance might be continued to her.

The widow of the testator was dead; *Mrs. Ayers*, who was now forty-three years of age, had eight children living: and 100*l.* was considerably less than an eleventh part of the annual income of the residuary property.

Mr.

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his children as should attain twenty-one; and it was held, that the children were entitled to interest on their shares for their maintenance during their minority. In this respect there could be no difference in principle between a bequest of a sum of money charged on land, and a devise of the land.

The MASTER of the ROLLS was of opinion, on the authority of that case, that the children were entitled to maintenance out of the residuary estate, both for the past time and for the time to come. *

“His Honor doth declare that *John Temperley, Georgiana Temperley, &c.*, infants, the only lawful children of *Nicholas Temperley* deceased, are entitled to be allowed for their maintenance and education, both for the time past and to come, out of the income of their expectant fortunes.”

Reg. Lib. 1826. A. 840.

* See *Mole v. Mole*, 1 *Dick.* 310. *Ellis v. Ellis*, 1 *Sch. & Lef.* 6.

Mr. *Lovat*, in support of the petition.

Mr. *Hart*, *contrà*.

The VICE-CHANCELLOR was of opinion, that the petitioner was entitled to an al-

lowance for her support, from the time she attained twenty-one until the time for the distribution of the fund should arrive; and an order was made according to the prayer of the petition.

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PHILIPPS v. CONST.

ROLLS.

March 8.


THE bill prayed that a grant of an annuity, and a warrant of an attorney which had been executed as a security for the annual payments, might be declared void, on the ground that a sufficient memorial of them had not been enrolled.

It is not necessary, under the 17 G. 3. c. 26., that the memorial of an annuity should contain the Christian names of the attesting witnesses at full length: and the memorial is sufficient, if it states them as they appear signed to the attestation of the deed.

The deed granting the annuity, and the warrant of attorney, were dated the 16th of *October* 1806, and the execution of each of them was attested by the same two witnesses. The memorial, so far as it related to the attestation of the instruments, was in the words, “The execution of such indenture, whereof this is a memorial, is witnessed by *G. H. Browne*, of *Lincoln’s Inn*, in the county of *Middlesex*, Gentleman, and *E. A. Browne*.” “The execution of which warrant of attorney by the said *Richd. Mansel Philipps*, is also witnessed by the said *G. H. Browne* and *E. A. Browne*.” The bill was filed in *May* 1824, insisting that the memorial was defective, because it did not contain the Christian names of the attesting witnesses, and, instead of such names, gave only initial letters.

The question was, whether, upon the true construction of the 17 G. 3. c. 26. s. 1., which applies to all annuities granted before the 53 G. 3. c. 141. came into operation, it was essential to the validity of an annuity, that the memorial should contain the names of the attesting witnesses at full length.

It was stated at the bar, that the names of the attesting witnesses were set forth in the memorial, in the
same

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same form in which they were signed to the attestation of the deed and the warrant of attorney, and that the grant was executed by *Philipps* alone.

Mr. Shadwell and *Mr. Knight*, for the Plaintiff.

As the 53 G. 3. does not repeal the old act, so far as regards annuities which had been granted before the 14th of *July* 1813, the annuity in question, being granted in 1806, comes under the regulations of the 17 G. 3. c. 26. The first section of that act requires, that every memorial “shall contain the day of the month and the year when the deed, bond, instrument or other assurance bears date, and *the name* of all parties, and for whom any of them are trustees, and *of all the witnesses*, &c. otherwise any such deed, bond, instrument or other assurance shall be null and void to all intents and purposes.” “Name,” in the singular number, is here used for “names” in the plural; for what is here required to be set forth is the name of more persons than one. The enactment of the 53 G. 3. c. 141, with respect to annuities granted after the 14th of *July* 1813, is, on this point, the same with the preceding act: it requires a memorial “of the *names* of all the parties, and *of all the witnesses* thereto.” Upon that clause it was held by the King’s Bench, that the memorial was insufficient, when it did not set forth the Christian name of an attesting witness at full length, *Cheek v. Jeffries* (a), *Metcalf v. Bowes* (b); and the same construction must be applied to the 17 G. 3. c. 26. The legislature, it is true, interfered to remove the hardships which were supposed to flow from this construction of the 53 G. 3., and, by the 7 G. 4. c. 75., has declared, that the memorial is sufficient, if it sets forth the names of the
witnesses

(a) 2 *Barn. & Cress.* 1.

(b) 5 *Barn. & Cress.* 258.

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witnesses as they appear signed to the attestation of the deed or instrument. But this last act is expressly confined to annuities regulated by the 53 G. 3.: and the present case, therefore, must be decided on the words of the old act, construed by the application of the principle on which the Court of King's Bench decided in *Cheek v. Jeffries* and *Metcalf v. Bowes*.

In fact, the Christian name is not a less essential part of the name of an individual, and is even less changeable, than the surname; and if the former may be omitted or abbreviated, the latter may be dealt with in the same manner. In what rational sense can “*G. H. Browne*” and “*E. A. Browne*” be said to be the names of the two attesting witnesses? It is not even possible from such a designation to conjecture what their names are.

Mr. Sugden and Mr. Simpkinton, contra.

In *Watts v. Millard (a)*, the omission, in the memorial, of the Christian name of a witness to a warrant of attorney for securing an annuity, was held to be an objection of no weight.

The decisions in *Cheek v. Jeffries* and *Metcalf v. Bowes* were pronounced without due consideration: and if the legislature had not interfered, the principle, on which they proceeded, would probably have been corrected in the House of Lords. The 7 G. 4. does not introduce a new law; it merely declares what is the true construction of the 53 G. 3.; and as the terms used in the 53 G. 3. are more particular than those of the 17 G. 3., the construction, which the legislature has declared to be the true

(a) 5 T. Rep. 598

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true construction of the 53 G. 3., must *à fortiori* be the true construction of the 17 G. 3. If the Plaintiff is in the right, no witness can attest an annuity deed, unless he writes his Christian name at full length: for if he uses an abbreviation, a memorial, which sets it forth at length, will not correspond with the deed; and if the memorial does correspond with the deed, it must adopt the witness's abbreviation, and becomes for that very reason defective.

Mr. *Phillimore*, for a trustee.

Mr. *Shadwell*, in reply.


If the cause had come to a hearing before the 7 G. 4. c. 75. was passed, the decision of the King's Bench must have entitled the Plaintiff to a decree; unless this Court were prepared to reject the construction which the highest of the ordinary legal tribunals has repeatedly put on an act of parliament, and to place itself, on a mere point of law, in direct opposition to the courts of common law. How can his rights be varied by an act, which has no reference to the act under which he claims relief, and which was not passed till two years after his bill was filed?

The MASTER of the ROLLS.

On the construction of the 17 G. 3. c. 26., coupled with the subsequent acts on the subject, I am of opinion that this memorial is sufficient.

On the words of the 17 G. 3. alone, and without reference to the later enactments, I should have had very great doubts, but for the decisions which have been referred to, whether it would not have been sufficient to
have

have set forth the names of the attesting witnesses in the memorial in the same form as they appeared signed to the deed. When the act provided that the memorial should contain the “name of all the witnesses,” was it intended to require any thing more, than that it should set forth the names according to the mode in which the witnesses actually signed them? Where greater particularity was required, as in the third section, it was expressly enacted, that, in the deed granting the annuity, the consideration and “the name or names of the person or persons, by whom and on whose behalf the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth and described *in words at length.*”

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The 53 G. 3. c. 141. is more precise in its provisions than the 17 G. 3. It enacts, that there shall be enrolled a memorial of the date of the deed, &c., “of the names of all the parties and of all the witnesses thereto,” &c.; and, in order to designate unequivocally what is meant by the “names,” a schedule is annexed, which shews that the Christian name, as well as the surname, ought to be specified. Cases arose under this act, in which the Christian name was set forth in the memorial, not at length, but in initial letters, or in some abbreviated form; and the Court of King’s Bench was of opinion, that such a memorial was not sufficient, and that the Christian name should have been set forth at full length. No sooner, however, had the Court come to that decision, than the legislature interfered; and by the 7 G. 4. c. 75. it is enacted and *declared*, “That, by the act of the fifty-third year of the reign of his late Majesty, no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is or are required in the memorial

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memorial thereof, besides the names of all such witnesses as they shall appear signed to their attestations respectively of the execution of such deed, bond, instrument, or other assurance; and so the said act shall be deemed, construed, and taken."

The effect of the last-mentioned act is not simply to neutralise the determinations of the Court of King's Bench on the point; it has an operation similar to a writ of error, and it amounts to a declaration that the Judges of the King's Bench had not rightly construed the 53 G. 3. If they have construed that act improperly, we should construe the former act improperly, if we were to hold that the memorial must contain the Christian names of the witnesses at full length.

Therefore, comparing the 17 G. 3. with the 53 G. 3., and looking at the construction which parliament has declared to be the true construction of the latter act, I am justified in putting the same construction on the former act.

The bill was dismissed with costs.

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MALPAS v. ACKLAND.

ROLLS.
March 9.

MARY COLMAN, by her will dated the 21st of December 1762, devised all her hereditaments at *Hammersmith* to *John Hannam* and his heirs, upon trust to pay the rents to *Susannah Ford* during her life, for her separate use, and if there should be children of *Susannah Ford*, who should attain twenty-one and be living at *Susannah's* decease, the testatrix directed that the hereditaments should be sold and the money divided among them: but if there were no such children, she devised the premises to her son *George Colman* in fee.

A. made a voluntary surrender of copyholds to a trustee upon trust for *F.* during her life, and, if at her death she left children who attained twenty-one, upon trust to sell and divide the money among them; but if that event did not take place, upon trust for *A.* in fee: afterwards, by a deed, reciting that the trustee was seised of the premises upon trust for *F.* and her husband and *A.*, the trustee, and *F.* and her husband, and *A.* concurred in demising the premises, for a valuable consideration, to *G.* for a long term of years:

The premises at *Hammersmith* were copyhold, and consisted principally of houses. The testatrix died in *May* 1767, without having surrendered them to the use of her will; but, in order to give effect to her devise, *George Colman* shortly afterwards surrendered the copyholds to *Hannam* and his heirs, upon trust for the purposes declared in the last will of *Mary Colman*.

Subsequently the legal estate in the premises descended to *Henry Hannam*; and *Susannah Ford* intermarried with *William Malpas*.

By an indenture dated the 10th of *November* 1784, and made between *Henry Hannam* of the first part, *William*

Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of *F.*, and that the lease was void as against them.

Where a bill was filed against the devisee of the lease, praying that the lease might be declared void, and the Defendant insisted that, if the lease was set aside, the Plaintiffs ought to repay the monies expended by his devisor in the improvement of the premises, the executor of the devisor, who had assented to the devise of the lease, was not a necessary party to the suit.

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William Malpas and *Susannah* his wife, and *George Colman*, of the second part, and *James Gomme* of the third part, (which recited that *John Hannam* was, at the time of his decease, seised to him and his heirs of the above-mentioned copyhold premises, “upon trust for the use and behoof of *William Malpas* and *Susannah* his wife, and *George Colman*, for such estates in possession, reversion, or remainder as they became entitled to after the decease of *Mary Colman*, and that the trust had devolved on *Henry Hannam*”), it was witnessed, that, in consideration of the surrender of two subsisting leases, and of 300*l.* agreed to be laid out by *Gomme* in improvements, *Hannam*, *Malpas* and his wife, and *Colman*, demised the copyhold premises to *Gomme* for a term of twenty-one years. *James Gomme* devised them to his son *John*, and *John Gomme* subsequently devised them to *Ackland*.

In October 1823, *Susannah Malpas* died, leaving four children, who had attained twenty-one; and, in the following year, they filed their bill against *Ackland*, charging, that the recitals in the lease of 1784 were in themselves sufficient notice to *James Gomme*, that the lessors could not make a valid lease for sixty-one years. The prayer was, that the lease might be declared fraudulent and void as against the Plaintiffs; that possession of the premises might be delivered up; and that the Defendant might account for the profits from the death of *Susannah Malpas*.

The Defendant insisted that *James Gomme* had purchased the lease for a valuable consideration, without notice that any person, except the parties to the indenture of demise, had any interest in the premises; that, on the faith of its validity, he had expended a sum much exceeding 300*l.* in re-building and repairing the houses;
 and

and that, if the lease should be declared invalid, the money expended on the premises by *James Gomme* and *John Gomme* ought to be repaid to the Defendant.

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Mr. *Sugden* and Mr. *Longley*, for the Plaintiffs, argued, that the recitals in the deed of 1784 were notice to *James Gomme* of the trusts affecting the property, which, therefore, in the hands of him and all claiming as volunteers under him, remained subject to those trusts. *Daniels v. Davison.* (a)

Mr. *Pepys* and Mr. *Seymour*, for the Defendants.

The recitals in the deed of 1784 gave *Gomme* notice only of the trusts for the benefit of *George Malpas* and *Susannah* his wife, and *George Colman*; and as the trustee, who had the legal estate, and all the persons, who were stated to have any beneficial interest, concurred in the conveyance, the purchaser had no inducement to push inquiry further. There was nothing to awaken a suspicion that the present Plaintiffs, or any other person not named or referred to in the recitals, had an interest in the property. The notice of the existence of a trust for *A.* cannot impose on a purchaser an obligation to inquire, whether there is not also a trust for *B.* No case can be cited, in which a purchaser for valuable consideration has been held bound by constructive notice in consequence of such a recital as occurs here.

Even if *James Gomme* had notice, he is a purchaser for valuable consideration from *George Colman*, and the Plaintiffs have no title, except under the voluntary surrender by *George Colman*; for his mother's devise was altogether inoperative. Here then is one party claiming

(a) 16 Ves. 249.

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claiming under a voluntary settlement, and the other party is a subsequent purchaser for valuable consideration from the settlor: and it is now settled, that, according to the true construction of the 27 *Eliz. c. 4.*, a voluntary conveyance is void against a subsequent purchaser for valuable consideration, though with notice of the prior deed. *Otley v. Manning* (a), *Pulvertoft v. Pulvertoft* (b), *Buckle v. Mitchell*. (c)

Mr. Sugden, in reply.

In *Otley v. Manning*, and the other cases of that class, the purchaser claimed *against* the voluntary conveyance, and it was the object of the grantor to defeat the settlement. Here the purchaser claims *under* the surrender of *George Colman*, who is a party to the conveyance only in respect of the beneficial interest which he took under that surrender: and that conveyance affirms the voluntary surrender, by recognising the trusts on which it was made.

If a man has before him what ought to put him on fair inquiry, and he does not inquire, the knowledge of all that he might have learned by such inquiry must be imputed to him. The recitals in the deed of 1784 made it the duty of *Gomme* to inquire what were the specific trusts affecting the legal estate of *Hannam*; and that inquiry would necessarily have led him to a knowledge of the rights of Mrs. *Malpas's* children.

The MASTER of the ROLLS was of opinion, that the 27 *Eliz. c. 4.*, and the cases decided on it, had no application to the facts which existed here; that the circumstances were such as to have rendered it incumbent

on

(a) 9 *East*, 59.

(b) 18 *Ves.* 84.

(c) 18 *Ves.* 100.

on *James Gomme* to have made further inquiry; that he must be considered as having had notice of the title of Mrs. *Malpas's* children; and, therefore, that the decree ought to be according to the prayer of the bill.

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A preliminary objection had been taken for want of parties.

The Plaintiffs, it was said, if they succeeded, would, or at least might, have to repay the sums which were alleged to have been expended by *James Gomme* and *John Gomme* in the improvement of the premises; the personal representatives of those gentlemen would be the persons to receive the repayments, and they were not parties to the suit.

It was answered, that the executors of those gentlemen had respectively assented to the devise of the leasehold, and that, as a devisee of a leasehold, the executor having assented to the devise, was entitled to all the interest of the devisor in the premises, the Defendant, if he could not sustain the lease, was the person who alone would have a right to receive any sum that might be due from the Plaintiffs in respect of the money expended on the premises.

The MASTER of the ROLLS overruled the objection.

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June.

ABDY v. GORDON.

A testator, being absolute owner of some copyholds, of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor, to which he had not been admitted, but subject to trusts, under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered to the use of his will all his copyholds, holden of that manor, or which he was seised of, or entitled to, either in possession, rever-

JAMES GORDON, being seised in fee of some copyholds holden of the manor of *Much Hadham*, and, among others, of a tenement called *Palmers*, all of which he had surrendered to the use of his will, devised all his freehold and copyhold tenements and hereditaments to trustees and their heirs, to the use of them and their heirs, in trust for the testator's nephew, *James Brebner* the elder, for his life; with remainder in trust for *James Brebner* the younger, the son of the nephew, for life; with remainder to the first and other sons of *James Brebner* the younger, severally and successively, in tail male; with remainders over, and the ultimate reversion to his own right heirs: and he directed the residue of his personal estate to be laid out in the purchase of fee-simple, copyhold, or leasehold estates, which, when purchased, were to be settled to the same uses.

James Gordon died in 1768, leaving *James Brebner* the elder one of his two co-heirs, who took the surname of *Gordon*, and entered into possession of the devised copyholds. The trustees under the will contracted with him

sion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainders over: Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the deviser was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts, to which some of the copyholds were subject.

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him for the purchase of certain copyholds, leaseholds, and freeholds in *Much Hadham*, of which he was the proprietor: the purchase-money was paid out of the personal estate of the testator; and, by indentures of lease and release, dated the 26th and 27th of *November* 1779, *James Gordon* (formerly *Brebner*) conveyed to the surviving trustees, Lord *Adam Gordon* and *Henry Wilmot*, and their heirs, the freeholds and leaseholds for lives; and he covenanted to surrender the copyholds to them and their heirs, to hold all the said tenements and hereditaments upon the trusts of the will. No surrender was made in pursuance of this covenant.

In 1789, previous to and in contemplation of the marriage of *James Gordon* (formerly *Brebner*) the younger with *Harriet Whitbread*, *James Gordon* the elder, by indenture dated the 9th of *July*, conveyed certain estates to trustees upon trust, after the marriage, to secure a jointure of 1500*l.* a year to his son's intended wife, and subject thereto, to himself for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the marriage in tail male; with remainders over, the last of which was to the settlor *James Gordon* in fee. And he covenanted to surrender certain copyholds, which he then held in fee of the manor of *Much Hadham*, to the use of the trustees and their heirs, upon the same trusts. This covenant he never performed.

In 1807, *James Gordon* the elder died, leaving *James Gordon* the younger his only son and customary heir. As the trustees of the will, though admitted to the other devised copyholds, had not been admitted tenants of *Palmer's* tenement, and as the copyholds, comprised in the covenants contained in the conveyance of 1779 and in the settlement of 1789, had not been surrendered, the

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legal estate of a moiety of *Palmers* tenement, and of the whole of the copyholds affected by these covenants, descended to *James Gordon* the younger. There were, likewise, other copyholds holden of the same manor, which had been acquired by the father after the execution of the deed of 1789, and to which, on his death, the son became entitled as customary heir. *James Gordon* the younger was admitted tenant of the last-mentioned copyholds on the 22d of *April* 1808. On the 13th of *July* 1808, he surrendered into the hands of the lord all his copyhold estates holden of the manor of *Much Hadham*, or which he was seised of, interested in, or entitled to, either in possession, reversion, remainder, or expectancy, to the use of his will, made or to be made in writing; and, on the 7th of *April* 1809, he was, as heir of his father, admitted tenant of the copyholds comprised in the deeds of 1779 and 1789, to hold the same to him and his heirs according to the custom.

James Gordon the younger by his will, dated the 30th of *May* 1818, devised all his manors, messuages, lands, tenements, and hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son *James Adam Gordon* for his life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *James Adam Gordon* severally and successively in tail male; remainder to Lady *Abdy* for her life; remainder to her son, Sir *William Abdy*, for his life; remainder to his first and other sons, severally and successively, in tail male; remainder to all and every the daughters of *James Adam Gordon* and Lady *Abdy*, and to their heirs and assigns, as tenants in common.

James

James Gordon the younger died in 1822, leaving *James Adam Gordon* his only son and customary heir. Neither he nor Sir *William Abdy* had any children; so that there was no person *in esse*, who was entitled to an estate tail under the limitations of the will. Lady *Abdy*, the mother of Sir *William*, had two daughters, who, on the failure of the estates tail, took the fee under the ultimate devise.

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James Adam Gordon, after his father's death, insisted, that, under the will of the first testator, he was tenant in tail of the copyholds thereby devised, and of the copyholds purchased in 1779 with part of the testator's personal estate, and that, under the marriage-settlement of 1789, he was likewise tenant in tail of the copyholds on which that deed operated; and he proceeded to acquire the absolute interest by barring the entails.

On the other hand, Lady *Abdy*, her son Sir *William Abdy*, and her two daughters, with their husbands, contended, that one moiety of the tenement called *Palmers*, and the copyholds comprised in the indentures of 1779 and 1789, having been duly surrendered by *James Gordon* the younger to the use of his will, were comprised, or intended to be comprised, in the general devise made by his will; and that *James Adam Gordon* was bound to elect either to give full effect to such general devise, or, if he should claim the copyholds by any title paramount to the testator's, or in opposition to the will, to relinquish all benefit and advantage under his father's devises and bequests: and they filed their bill, praying that he might be put to his election.

James Adam Gordon, by his answer, submitted, that none of the copyholds in question, but only those copyholds, of which *James Gordon* the younger was seised in fee

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fee both at law and in equity, passed by the surrender to the use of his will.

When the cause came to a hearing, a decree was made, with the acquiescence of all parties, directing a case for the opinion of the Court of King's Bench; and the question was, "Did the legal estate in fee of any, and if so, of which of the copyholds, pass by the surrender of the 13th of *July* 1808, and the will of *James Gordon* the younger, dated the 13th of *May* 1818?" After the case had been set down for argument, the counsel of *James Adam Gordon* admitted, that it was so clear that the legal estate in fee of all the copyholds passed by the surrender and the will, that the point did not admit of argument. The case was, therefore, withdrawn, and a petition of re-hearing presented.

Mr. Shadwell and *Mr. Purvis*, for the Plaintiffs.

James Gordon the younger had been admitted to the copyholds comprised in the conveyance of 1779 and the settlement of 1789; and as to *Palmer's* tenement, though no person had been admitted tenant since the death of the original testator, the fee of a moiety of it had descended to him as customary heir of one of two customary co-heirs. An heir, taking copyhold lands by descent, is tenant prior to admission, and may, before admission, surrender to the use of his will. The surrender, therefore, of all the copyholds, of which he was seised or in which he was interested, to the use of his will, must at law pass the copyholds, which were subject to the trusts of the original testator's will, or of the conveyance of 1779, or of the settlement of 1789; and the legal operation of the will must be equally extensive. These copyholds, therefore, are subjected to the trusts of the will; and there is no reason for supposing that the
testator's

testator's intention was different. He had not only the immediate legal fee, but also the ultimate equitable fee. There is not a pretext for saying that his reversionary equitable fee does not pass by the will; and if the will passes the whole legal fee, and the ultimate equitable fee, nothing can be more improbable than that the testator should not have intended the immediate possession to pass. *James Adam Gordon* is, therefore, bound to elect between the benefits given him by the will, and the copyholds devised by the will, which he may claim by a paramount equitable title.

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The following authorities were cited 4 *Co. Rep.* 22 b. 29 b.: *Williams v. Lord Lonsdale* (a), *The King v. Sir Francis Willes* (b), *The King v. The Brewers' Company* (c), *The King v. The Lord of Bonsall* (d), *Roe v. Griffiths* (e), *Welby v. Welby* (g), *Wall v. Bright*. (h).

Mr. Preston, contra.

The question is simply, Whether, upon this will, an intention is manifested to devise copyholds, of which the legal fee was in the testator merely as a trustee for others in tail after his own death, and ultimately for himself and his heirs? He had copyholds of which he was absolute owner both in law and equity; and the nature of the limitations in the will tends to shew, that he meant to devise those copyholds only, of which he had the complete ownership. It may be admitted further, that he meant his reversionary equitable fee to pass; for he has devised all his copyholds in possession, reversion, remainder, or expectancy: but those words will be nugatory

(a) 3 *Ves.* 754.

(b) 3 *B. & A.* 510.

(c) 3 *B. & C.* 172.

(d) 3 *B. & C.* 173.

(e) 1 *Bl.* 605. 4 *Burr.* 1952.

(g) 2 *V. & B.* 187.

(h) 1 *Jac. & Walk.* 494.

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gatory, if we impute to him a purpose to give the whole fee, where all the equitable interest, which he had to dispose of, was a reversion expectant on estates tail. Why did he use the word "reversion," if he did not mean to give, merely as a reversion and not as an immediate fee, such of his interests as in equity were not more than reversions? Every word of this will may have full effect, without ascribing to the testator an intention to devise any thing except what was his own, and what he had both at law and in equity a complete power to dispose of. Why, then, should we ascribe to him an intention of devising the immediate possession of lands, which in equity did not belong to him? *Welby v. Welby*. (a) *Lord Braybrooke v. Inskip* (b), *Judd v. Pratt* (c).

1828.
June.

Judgment was not pronounced in Court; but the registrar transmitted to the parties the following intimation:

"The LORD CHANCELLOR is of opinion, that under the circumstances the beneficial interest passed by the will of Mr. Gordon's father, and that, therefore, the Plaintiff, Mr. J. A. Gordon, should be put to his election."

The decree contained the following declarations: —
"It being admitted that the legal estate in fee of all the said testator's copyhold estates passed by his surrender and will, his Lordship doth declare, that the beneficial interest in such estates did, according to his will, also pass thereby; and that the Defendant *James Adam Gordon* is therefore bound to elect, whether he will abide by and give full effect to the general devise made by the will

(a) 2 V. & B. 187.


(b) 8 Ves. 417. 437.

(c) 15 Ves. 390.

will and codicil of the 8th day of *October* 1819; and, the said Defendant *James Adam Gordon*, by his counsel, now electing to abide by the said will and codicil, his Lordship doth declare, that the said moiety, or half-part of the said copyhold tenement, called *Palmers*, and the lands thereto belonging, and the entirety of the copyhold and customary hereditaments and premises mentioned and comprised in the indentures of the 26th and 27th of *November* 1779, and the 9th of *July* 1789, without prejudice to the claims of *Harriet Gordon*, in respect of her annuity or jointure, are subject to the uses and trusts of the said will: And his Lordship doth declare, that the Defendant *James Adam Gordon* do make and execute all such securities and other assurances, and do and perform all such acts, deeds, matters, and things as may be necessary to vest the said hereditaments and premises absolutely in the Plaintiff *George Caldwell*, and the Defendants *John Fallowfield Scott* and *Thomas Fellows*, as such trustees of the will of the said *James Gordon*, deceased, without prejudice as aforesaid."

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MEMORANDUM.

ON the first day of *Easter* term (2d of *May*) 1827, Lord *Lyndhurst* took the oaths, and commenced his sittings, as Lord High Chancellor; and, on the same day, Sir *Anthony Hart* took his seat as Vice-Chancellor.

In the following week, Sir *John Leach*, Master of the Rolls, commenced his sittings.

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LIVESEY v. LIVESEY.

May 4.
October 30.

JAMES WORTHINGTON, by his last will, devised and bequeathed to his wife *Jane Worthington* all his estates, real and personal, "subject to the following trusts and conditions." Then the will, after giving some directions, which it is not material to mention, proceeded in the following words: — "I also will and direct that my wife shall pay unto each of my daughters, *Jane* and *Eliza*, 200*l.* annually, by two equal half-yearly payments, out of the interest arising from my fortune. After my wife's death, I vest my property in trust, not already disposed of, to my brother-in-law, *Mr. John Armstrong*, and *Mr. William Clark*, for them to place out at interest on the best mortgage securities that may be had, or in the purchase of an estate or states, with the consent of my daughters; and that my said daughters shall receive the annual interest or profits, bare and share alike, which shall not be subject to the control or debts of their husbands, but to their receipts only. And my will and mind is, that my trustees shall pay to and apply for the benefit of my grandson, *Ed-*

mund

A testator gave his property, after the death of his wife, to trustees, on trust to pay the interest and profits to his two daughters *J.* and *E.*, to their separate use, with a direction to pay to and apply for the benefit of *A.*, the son of *E.*, 200*l.* annually, when he attained the age of twenty-one years, and before that period, such part of the 200*l.* bequeathed to him, as might be judged proper; he then gave his daughters

power to dis-

pose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to *E.*, and from which the interest is to arise to my grandson, viz. 4000*l.*, which sum shall be my grandson's property;" and, in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children or grandchildren:

Held, that *A.* was not entitled to the annuity, till he attained twenty-one; nor to the 4000*l.*, till the death of his mother;

A. having attained twenty-one, and died in his mother's lifetime: Held, that the annuity ceased upon his death, and that the 4000*l.* never vested in him.

The executrix having, in mistake, made payments to *A.* in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity.

An order, authorizing her to retain them, and made upon petition, after the decree had been passed and entered, is regular.

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mund Worthington Livesey, the sum of 200*l.* annually, when he attains the age of twenty-one years, and before that period such part as may be judged proper out of the 200*l.* bequeathed to him, so as to give him a good education; being desirous that he may be brought up in a judicious manner, to give him a degree of respectability in society equal to his family and fortune, which have always supported honourable and useful characters in life. As to the principal, my mind is, that my said daughters, *Jane* and *Eliza*, shall have full power to dispose of it in such proportions as they by will shall direct, to their children or grandchildren respectively, except that proportion of principal given to *Eliza*, and from which the interest is to arise to my grandson, viz. 4000*l.*, which sum shall be my grandson's property; but in case either of them should die without having lawful issue, then my will is, that the fortune of her so dying shall revert to and become the property of the surviving one, her children, or grandchildren, to be disposed of to them in such proportions as the one departing this life shall will and direct; and she shall also have the power of bequeathing unto her husband, provided she leaves one, 100*l.* per annum as an annuity, to be issuing from and out of the moiety so disposed of; which moiety is to be subject to the restriction, limitation, and distribution aforesaid."

The testator died in 1800, leaving his widow and his two daughters, *Jane* and *Eliza*, him surviving. The widow died in *July* 1815. *Edmund Worthington Livesey*, who was the eldest son of *Eliza*, attained his full age in *August* 1817, up to which time no part of the testator's estate had been applied towards his maintenance or education.

In *November* 1817, a bill was filed by *Jane Livesey*, the daughter and personal representative of the testator,
and

and by her husband, in order to have the rights of the parties under the will declared.

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Edmund Worthington Livesey insisted by his answer, that he was entitled to the annuity of 200*l.* from the time of the testator's death, and that, on his attaining twenty-one, the testator's widow being then dead, the 4000*l.* became payable to him.

The other Defendants submitted, that the annuity did not commence, till *Edmund Worthington Livesey* attained the age of twenty-one, or, at all events, till the death of the testator's widow.

On the 19th of *November* 1821, the cause was heard before the Master of the Rolls, and a decree was pronounced.

The Plaintiffs, conceiving that *Edmund Worthington Livesey* was entitled to the annuity for the two years which elapsed between the death of the testator's widow and his attaining the age of twenty-one, had paid it to him, and had deducted 400*l.* out of that moiety of the interest which was payable to *Eliza*. At the hearing, however, the Master of the Rolls declared it to be his opinion, that the annuity did not commence till *Edmund* attained twenty-one; and, upon this, *Eliza*, after judgment was pronounced, but before the decree was drawn up, presented a petition, praying that a direction might be added for the payment to her of the 400*l.*, which had been thus withheld.

By the decree, as added to by the order made on this petition, it was declared, that the clear residue of the testator's estate, after the decease of his widow, became vested in his trustees and executors, upon

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trust to pay the interest to the testator's daughters in moieties during their respective lives, for their separate use, subject to a deduction, out of the interest payable to *Eliza*, of 200*l.* per annum to *Edmund Worthington Livesey*, upon his attaining the age of twenty-one years, and to commence from that time and not before; that the 4000*l.*, bequeathed to *Edmund Worthington Livesey*, was payable, upon the decease of *Eliza Livesey*, out of the moiety bequeathed for the benefit of her and her children, upon the terms and according to the directions of the will; that the power to apply part of the interest of the residue for the education of *Edmund Worthington Livesey* during his minority did not arise, until after the death of the testator's widow; that, upon her decease, the exercise of such power depended upon the ability of the father of *Edmund Worthington Livesey* to support and maintain him; and that no evidence had been given to shew, that any sum of money became payable in respect of that direction in the testator's will: — And, the Plaintiffs having deducted from the moiety of the interest of the residuary estate, payable to *Eliza Livesey*, the sum of 4000*l.* in respect of the annuity claimed by *Edmund Worthington Livesey*, for the period between the decease of the widow and his attaining the age of twenty-one years, — it was ordered, that the Plaintiffs should forthwith pay the sum of 400*l.* unto *Eliza Livesey*.

On the 5th of *July* 1822, the Plaintiffs presented a petition, stating, that, after *Edmund* attained his full age, they had paid over to him the 400*l.* which had been retained out of *Eliza's* share of the interest, in order to satisfy the annuity for the two years which intervened between the death of the testator's widow and the termination of *Edmund's* minority. It prayed that a direction might be added to the decree, to enable them to retain the 400*l.* out of the growing payments of

Edmund's

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Edmund's annuity. Before the petition was heard, the decree was drawn up. But by an order, bearing date on the 29th of *July* 1822, the Master of the Rolls directed, that the Plaintiffs should be at liberty to deduct out of the future payments of the annuity, such sums as they had paid in respect of the annuity before *Edmund* attained the age of twenty-one years.

From this order, and also from the decree, *Edmund Worthington Livesey* appealed. The petition of appeal insisted, that the Court ought to have declared that he was entitled to the annuity of 200*l.*, or the sum of 200*l.* per annum, as the interest of the 4000*l.*, from the death of the testator, or at least from the death of the widow, *Jane Worthington*, till the payment of the 4000*l.*; and that the 4000*l.* ought to have been ordered to be paid to him, or at least that there ought to have been a declaration, that he took a vested interest in that sum, and that it should be paid to him, his executors, administrators, or assigns, upon the death of his mother, *Eliza Livesey*.

Mr. *Shadwell*, Mr. *Preston*, and Mr. *Duckworth*, for the Appellant.

I. The testator directs his trustees "to pay to *Edmund Worthington Livesey* 200*l.* annually when he attains twenty-one, and, before that period, such part as may be adjudged proper out of the 200*l.* bequeathed to him." The 200*l.* a year is expressly spoken of as bequeathed to *Edmund* even before he attains twenty-one; but, during his minority, as the payments could not be made to himself, only such part of the annual sum given to him, as might be necessary for his education, was to be expended; the residue was to accumulate for his benefit. The bequest, therefore, of the 200*l.* a year, even if it

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were a mere annuity unconnected with any other gift, is not postponed till the legatee attains his full age.

In fact, however, the 200*l.* a year is not so much an annuity, as the interest of a principal sum bequeathed to *Edmund*; for the testator speaks of that proportion of the principal of his fortune, “from which the interest is to arise to my grandson, viz. 4000*l.*, which sum shall be my grandson’s property.” This is an immediate bequest of the 4000*l.*; *Cloberry v. Lampen* (a); and, till the principal sum is paid to him, he is to receive 200*l.* a year as interest. That interest must, therefore, run from the death of the testator, unless a clearly expressed intention to the contrary can be found in the will: and, though there may be some reason for supposing, that the benefits given to the grandson were not to take effect till the death of the testator’s widow, there is no ground on which they can be postponed to any later period.

II. Supposing that payment of the 200*l.* was not to commence, according to the true construction of the will, till *Edmund* was twenty-one years of age, yet the executrix cannot recover back from him the 400*l.*, which she paid to him in respect of the annuity for the two years immediately preceding his attainment of his full age: for those payments were made with perfect knowledge of the facts; and if there was any mistake, it was, at the utmost, merely a mistake in point of law. *Brisbane v. Dacres* (b), *Skyring v. Greenwood* (c). Even if those payments could be recovered back, they would constitute merely an ordinary debt owing by *Edmund* to

(a) *Freetm.* 25. 1 *Equ. Cas.*
Abr. 294. 2 *Vent.* 342.

(b) 5 *Taunt.* 143.
(c) 4 *Barn. & Cress.* 281.

to the executrix ; and on no principle can they be considered as a charge on the future growing payments of the annuity.

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The order authorizing the Plaintiffs to retain the 400*l.* is wrong in form, as well as in substance; for the effect of it is to vary the decree. It takes away from *Edmund* part of what the decree has given him. If the Plaintiffs had a case which entitled them to that relief, still they ought to have brought it forward by a supplemental bill.

Sir Charles Wetherell and *Mr. Bickersteth*, for the children of the Plaintiffs.

It is evident, that the benefits given to the grandson were not to commence, till after the death of the testator's widow; for the trust, by means of which the payments were to be made to him, was not to arise during her life. It is further clear that the 4000*l.* was to remain a part of *Eliza's* moiety of the fund during her life; and all that *Edmund* is entitled to, in the meantime, is the 200*l.* a year. This annuity of 200*l.* was to commence only from his attainment of his full age; and though a discretion was given to the trustees to make an allowance for his education and maintenance during his infancy, they did not think, that the circumstances of the family rendered it advisable for them to do so.

Mr. Pepys, for *Eliza Livesey*, followed the same line of argument.

Mr. Horne and *Mr. Wray*, for the Plaintiffs.

If the decree puts the true construction on the will, the order made on the petition is correct both in form

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and in substance. It does not vary the decree; but it enables the trustee to deal with the trust-fund according to the rights which the decree has declared. *Brisbane v. Davies*, and that class of authorities, have no application to a question between trustee and *cestuique trust*. If a trustee makes over-payments to a *cestuique trust*, he may unquestionably reimburse himself out of the trust-fund.

Oct. 30.

The LORD CHANCELLOR.

Although this will is very inartificially and ignorantly drawn, there does not appear to me to be any serious difficulty in the construction of it, with reference to the events which have occurred. The trustees are directed by the testator to pay and apply 200*l.* a year for the benefit of his grandson, *Edmund Worthington Livesey*, when he attains the age of twenty-one years; and this payment is to be made out of the half share of the interest allotted to *Eliza Worthington*. It appears to have been the intention of the testator, that this payment should be continued during the life of *Eliza Livesey* the mother, and that the sum of 4000*l.*, the principal from which that annual sum was to arise, should be paid to the legatee at her death.

The testator, in adverting to the fund vested in the trustees, the interest of which was to be shared equally by his two daughters, (with the deduction from *Eliza Worthington's* portion of her son's annuity), gives to his daughters the power of disposing by will of their respective shares among their children or grandchildren; but says, in effect, as to *Eliza Worthington's* share, that one of her children, viz. *Edmund Worthington Livesey*, should have a certain part, viz. 4000*l.*, the sum from which

which his annuity had arisen, and which is described by the testator as a proportion of the principal given to his daughters. It appears, then, I think, to have been the intention of the testator that this sum should not be paid to his grandson, until his daughter *Eliza's* death, when the residue of her share would be distributed among her children or grandchildren, under the power given to her for that purpose by the testator. The authority conferred upon the trustees with respect to the allowance for the education of the grandson, does not vary the question. I am of opinion, therefore, that the judgment of the Master of the Rolls was right, and that the decree ought to be affirmed.

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With respect to the order upon the petition, it appears, that, after the commencement of the suit, the annuity was paid to *Edmund Worthington Livesey* for two years, the period which elapsed from the death of *Jane Worthington* to his attaining the age of twenty-one. The payment was made upon an erroneous supposition, that he was entitled to it; and an equal amount was deducted from the moiety of the interest payable to *Eliza Livesey* under the will. After the Master of the Rolls had given judgment in the cause, but before the decree was drawn up, a petition was presented by *Eliza Livesey*, praying that the sum, which had been so deducted from her moiety of the interest, might be directed to be paid to her; and this was ordered accordingly in the decree. A petition was then presented on the part of *Jane Livesey* the executrix, submitting that she was entitled to be repaid this sum, and praying that she might be allowed to retain it out of the future instalments of the annuity payable to *Edmund Worthington Livesey*. An order was made upon this petition, after the decree was passed.

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It was contended that this was irregular, and that the Court had no jurisdiction to make the order. There can be no doubt, that this money ought to be repaid: and the only question therefore, is, Whether the Master of the Rolls was justified, in point of form, in making the order in question? This order, made upon the petition of *Jane Livesey*, does not vary the decree. The decree merely declares the rights of the parties under the will, with the exception of the direction as to the payment to *Eliza Livesey*. The order does not make any alteration in these particulars. It is an order consequent upon that declaration. There is no dispute as to the facts. *Edmund Worthington Livesey* had been paid a sum of money on account of the bequest made to him by *James Worthington*. The bequest was supposed to be more extensive than it has since proved. The construction of the will was misapprehended. The order then merely directs that such sum, so paid, shall be considered in account with the executrix, and taken as a part-payment of the bequest as now ascertained. Such is the effect of the order. I think, therefore, that it not only is in substance just, as between those parties, but that it is not incorrect in point of form.

The appeal must consequently be dismissed.

1829.
March 23.

Edmund Worthington Livesey died in May 1827, during the lifetime of his mother.

His sister, *Mary Carter Livesey*, who was his executrix and the legatee of all his personal property, presented a petition to the Master of the Rolls, praying that the personal representative of Dr. *Worthington* might be

be ordered to pay to her the past arrears and growing payments of the annuity, until the 4000*l.* should become payable; and that, in the meantime, the 4000*l.* might be secured under the direction of the Court.

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This gave rise to two questions, which were, to a considerable extent, dependent on each other:

First, Whether the 4000*l.*, though not payable till the death of *Eliza*, had vested in *Edmund*:

Secondly, Whether the annuity of 200*l.* a year continued till the 4000*l.* became payable, or ceased on the death of *Edmund*.

Mr. *Agar*, Mr. *Preston*, and Mr. *Duckworth*, in support of the petition.

The testator has said that the 4000*l.* shall be his grandson *Edmund's* property: he has also given him 200*l.* annually, from the time he attains twenty-one, which annual payment of 200*l.* is spoken of as being the interest of the 4000*l.*; and the Court has declared that the 4000*l.* is payable at the death of his mother. This is, in substance, a bequest of the 4000*l.* payable at a future time, with a direction that the interest of it, at 5 per cent., shall be in the meantime paid to the legatee. The 4000*l.*, therefore, vested in *Edmund*, and his personal representative has a right to have that sum secured and appropriated. She has also a right to have the annual payment, which represents the yearly interest, continued to her, until the time for paying the principal arrives. *Elton v. Sheppard* (a), *Hope v. Lord Clifden* (b),
Schenck

(a) 1 Bro. C. C. 532.

(b) 6 Ves. 499.

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Schenck v. Legh (a), Powis v. Burdett (b), King v. Hake. (c)

This construction of the will is conformable to the decree, which declares that the 4000*l.*, bequeathed to *Edmund*, is payable upon the decease of *Eliza Livesey*, and to the language of the Lord Chancellor, when he says, "It appears to have been the intention of the testator, that this payment should be continued during the life of *Eliza Worthington*, the mother; and that the sum of 4000*l.*, the principal from which that annual sum was to arise, should be paid to the legatee at her death."

Mr. *Pepys*, Mr. *Wood*, Mr. *Treslove*, and Mr. *J. Russell*, *contra*.

The judgment and decree of the Lord Chancellor must be understood with reference to the question which was argued before him, and to the circumstances as they existed at that time. *Edmund* was then alive; and he contended that the 4000*l.* became payable on the death either of the testator or of the testator's widow. The Lord Chancellor rejected that construction, and held, that the death of *Eliza* was the time of payment. Whether it would be payable if *Edmund* should die in *Eliza's* lifetime, was a question which could not then come under consideration, because the events, out of which it springs, had not then happened. Even if the gift of the 200*l.* a year were to be considered as a bequest of the yearly produce of the 4000*l.*, *Edmund* would not have taken a vested interest in the latter sum; and the annual payment would have ceased with his death. *Batsford v. Kebbell. (d)* But in fact the annuity and the 4000*l.* are the subject of two distinct gifts. *Primâ facie*, a direction to pay 200*l.* annually to *A. B.* will not prolong

(a) 9 *Ves.* 300.

(b) 9 *Ves.* 428.

(c) 9 *Ves.* 438.

(d) 3 *Ves.* 363.

ing the payment beyond *A. B.*'s life: and here the annuity was clearly intended as a personal provision for *Edmund*, which was to be applied, as it accrued due, to his own individual benefit. It ceased, therefore, with his death. There is no gift of the 4000*l.* distinct from the clauses which fix the time of payment; the time of payment, therefore, must be the time of vesting.

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The general plan of the testator was, to give each of his daughters a life-interest in a moiety of his property, with a power of appointing that moiety by will at her death among her children and grandchildren; and though, as to *Edmund*, he qualified this plan by exempting him from the discretionary power of his mother, and fixing his share at 4000*l.*, yet *Edmund* was to take that 4000*l.* only as any of his brothers and sisters would take the shares which their mother might appoint to them; and those only could take under her appointment, who should be living at her death. If *Eliza* were to die without leaving issue, she would have a power of charging the whole of the moiety with an annuity to a surviving husband, and that moiety would go over to her sister and her sister's children and grandchildren. If *Edmund* had died under twenty-one, in his mother's lifetime, could it have been argued, that he took the 4000*l.* absolutely? It is impossible to except the 4000*l.* from the operation of the ultimate limitation over; and if that limitation extends to the 4000*l.*, *Edmund* cannot have taken a vested interest.

It is established by the decree, that he did not take a vested interest in the 4000*l.*, before he attained twenty-one; for if it had vested in him, he would have been entitled to the interest. Upon attaining twenty-one he became entitled to the annuity; but what words are to be found in the will, which place him, in the interval between

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between his attaining twenty-one and the time when the 4000*l.* was to be payable, in a situation with respect to the 4000*l.* different from that in which he previously was?

Mr. *Agar*, in reply.

The MASTER of the ROLLS stated, that, looking at the decree and the language of the will, he could not avoid coming to the conclusion, that the Court, at the hearing, must have been of opinion that the testator intended only a personal benefit to *Edmund*, and that, though the 4000*l.* was excepted from the mother's power of appointment, so that she should have no power to diminish *Edmund's* share, he was not to have it, unless he survived her. His Honor, therefore, made an order, directing an account of the arrears of the annuity accrued due in the lifetime of *Edmund*, and declaring that the 4000*l.* did not vest in him.

1827.

COLE v. FITZGERALD. (a)

May 5.

FITZGERALD devised to *Elizabeth Cole* his dwelling-house, garden, and premises at *Romsey* for and bequeathed to her absolutely all "the furniture, and other household effects, of and to him, in the said dwelling-house and premises, at the time of his decease."

A bequest of household furniture and other household effects in a dwelling-house and premises, comprises all property placed there, either for ornament, or for use or consumption in it.

Following articles, among others, were found in dwelling-house, or in the premises, at the testator's four fowling-pieces, a pair of pistols, lathes and tools for turning, with a quantity of ivory, marble &c., a patent sawing machine, a vice and anvil, a number of tools, a copying-machine, several pictures in frames, about a hundred volumes of such as are in ordinary circulation, an organ, a parrot, a grey pony, a cow, a hay-stack, and a considerable stock of wines and liquors.

By order of the Vice-Chancellor, bearing date the *January* 1823, it was declared, that the pony, fowling-pieces, and parrot and cage *, formed part of the general personal estate of the said testator, and several other articles were the property of *E. Cole*.

A peti-

(a) 1 *Sim. & Stu.* 189.

According to the statement in *ment* of the Vice-Chancellor, *198.* the parrot passed taken by the reporter, His Honor declared, that the parrot did not bequest to Mrs. *Cole.* pass. to a note of the judge.

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A petition of appeal was presented against so much of this order as gave Mrs. *Cole* the books, wines, and liquors, two mahogany turning lathes, with drawers and apparatus, a patent sawing machine and apparatus, two grindstones on stands, with apparatus, a work-bench, with three drawers, a vice and anvil, a mahogany chest of drawers for tools, a mahogany letter-copying machine, a large quantity of tools, and a stock of ivory, hardened mahogany, &c.

Mr. *Heald* and Mr. *Garratt*, in support of the appeal.

The effect of the Vice-Chancellor's order is, to strike out of the will the term "household," by which the bequest is limited, and to give to the legatee of the household effects in the house and premises, all the effects which were found there, whether they answer the description of household effects or not. By household furniture the testator meant chairs, tables, beds, and other articles of a similar kind, commonly known as furniture; by "other household effects" he meant pictures, china, and other articles intended for the general accommodation of the family, but not answering the description of ordinary furniture. "Household effects" is not a more comprehensive phrase than "household goods;" and in *Slanning v. Style* (a) it was held, that a bequest of "all household goods and implements of household in and about the dwelling-house," did not pass ale and beer which were on the premises. The general rule is, that articles, whose use is in their consumption, do not fall within the description of household goods or household effects. Books will not pass under a bequest of household furniture; and there is no authority for including them in a bequest of household effects.

(a) 3 P. Wms. 554.

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effects. The order, therefore, is erroneous, in so far as it gives Mrs. *Cole* the books, wines, and liquors. The other articles, to which the petition of appeal relates, could in no way contribute to household use, or promote the general purposes of family convenience: they were subservient only to a particular pursuit, and to the practice of the arts of turning and carpentry. The ground, on which the Vice-Chancellor held them to pass, was, that they were intended to be used in the house or on the premises; but, on the same principle, a gallery of pictures, a library of scarce books, a cabinet of ancient coins or medals, any collection of objects of *virtu* or curiosity, would also have passed by these words; which would be contrary to the whole current of authorities. *Porter v. Tournay* (a), *Le Farrant v. Spencer* (b), *Kelly v. Powlett* (c), *Woolcomb v. Woolcomb*. (d)

Mr. *Horne* and Mr. *Koe*, *contra*.

The LORD CHANCELLOR.

It is clear that this testator, by adding to "household furniture" "other household effects," meant to carry his bequest further than merely to household furniture. The only question is, how far the word "effects" is controlled by the word "household;" and though some doubt may be entertained with respect to the wines and liquors, the books, and the turning machinery, I do not see any sufficient reason for excluding any of them from the bequest to Mrs. *Cole*.

Order affirmed.

(a) 3 *Ves.* 311.

(b) *Ambl.* 605.

(c) 1 *Ves.* sen. 97.

(d) 5 *P. Wms.* 112.

1827.

May 5.

HOPKINS v. TOWLE. (a)

A testatrix bequeathed one moiety of the residue of her personal estate to her daughter *Hannah*, for her separate use, during the joint lives of her and her husband; and if she survived him, to her absolutely; if not, to such of her children living at her decease as should attain twenty-one; with a bequest over, if there were no such children, to another daughter, *Mary*, and her children; and she bequeathed the other moiety


to her daughter *Mary*, for her separate use, during the joint lives of her and her husband, and, after her decease, to such of her children living at her decease as should attain twenty-one; and if there were no such children of *Mary*, to *Hannah* and her children, in like manner as the first moiety; with a proviso, that, if *Hannah* died in her husband's lifetime, and should not have a child living at her decease who should attain twenty-one, the second moiety was to go over to *Hannah's* executors and administrators; and that, in like manner, the first mentioned moiety, in the event in which it was limited over, should, if *Mary* had not a child living at her death who should attain twenty-one, go over to *Mary's* executors and administrators: by a codicil, the testatrix gave 1500*l.*, if *Mary* died without leaving any child who attained twenty-one, to *Hannah* and her children, in the same manner as was in the will directed touching the first mentioned moiety of the residue; and in case both daughters died without leaving any child living who should attain twenty-one, she bequeathed the 1500*l.*, together with all the residue of her personal estate, to *A.*: both the daughters died without issue, but *Hannah* survived her husband: Held, nevertheless, that *A.* was entitled to the residue.

HANNAH LAMB by her will devised a freehold messuage at *Walthamstow* to trustees and their heirs upon trust to pay the rents to her daughter *Hannah Killingsley* for her separate use during the joint lives of her and her husband; and in case she should survive her husband, to permit her to receive the rents during her natural life; remainder to *Hannah's* children, living at her decease, as tenants in common in tail general; remainder to the testatrix's daughter *Mary Cooper* in tail; remainder to the right heirs of the testatrix. She then, after bequeathing 1000*l.* to *Mary Cooper* and 500*l.* to her husband, devised a freehold messuage at *Brentwood* to *Mary Cooper* in tail; remainder to trustees and their heirs on trusts the same (with the exception of the estate tail limited to *Mary Cooper*) as the trusts which had been declared of the messuage at *Walthamstow*.

After some other bequests, the testatrix gave the residue of her estate to trustees, their executors, and

(a) 1 Sim. & Stu. 357.

administrators, upon trust to invest the same on government or real securities, and pay the interest of one moiety thereof to *Hannah* during the joint lives of her and her husband for her separate use; and in case *Hannah* should survive her husband, then upon trust to stand possessed of one moiety of the residue for her use; but if she did not survive her husband, then in trust for her children in the manner therein mentioned, with a limitation over, if she had no children living at her decease who should attain twenty-one, in favour of *Mary Cooper* and her children, in the same manner as was thereafter directed touching the other moiety of the estate. The trusts of the other moiety were, to the separate use of *Mary* during the joint lives of her and her husband; and after her decease, for her children as therein mentioned; with a limitation over, in case she had no children living at her decease who should attain twenty-one, in favour of *Hannah* and her children, in the same manner as was directed touching the first-mentioned moiety. A proviso followed, that, if *Hannah* died in her husband's lifetime, and should not have a child, living at her decease, who should attain twenty-one, this second moiety should go over to *Hannah's* executors and administrators; and that, in like manner, the first-mentioned moiety, in the event on which it was limited over, should, if *Mary* had not a child, living at her death, who should attain twenty-one, go over to *Mary's* executors and administrators.

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By a codicil the testatrix altered her disposition of the freehold at *Walthamstow*, so as to give it, after failure of *Hannah's* issue, to trustees and their heirs, on trust for the separate use of *Mary* during the joint lives of herself and her husband, and, after the husband's decease, for *Mary* during her life; remainder to *Mary's* children living at her decease as tenants in common in tail; re-

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mainder in fee to all the children of the testatrix's two brothers who should be then living. The devise of the freehold at *Brentwood* was likewise revoked; and it was given to trustees, on trust for the separate use of *Mary* during the joint lives of her and her husband; remainder to her for life, if she survived her husband; remainder to her children living at her decease as tenants in common in tail; remainder to *Hannah* and her issue in like manner as the same was given to her and them by the will; remainder in fee to the children of the testatrix's two brothers who should be then living. The testatrix further revoked the bequests of the 1000*l.* and 500*l.* to *Mrs. Cooper* and her husband: and, in lieu thereof, she gave 1500*l.* to the trustees upon certain trusts for *Mary Cooper* and her children; and, if *Mary Cooper* should not have a child living at her decease who should attain twenty-one, the trustees were to stand possessed of the 1500*l.* in trust for *Hannah* and her children in the same manner as in the will was directed touching the first-mentioned moiety of the residue therein given to the trustees for the separate use of *Hannah* and her children: but, *in case both her daughters should die without leaving any child or children living at the time of their respective deaths, or leaving such, they should all die under the age of twenty-one years*, then the trustees were to stand possessed of the 1500*l.*, together with *all the residue of her personal estate, by her will given to them in trust for the separate use of her two daughters and their children as therein was mentioned*, in trust for all the children of her two brothers who should be then living, share and share alike, and to, for, and upon no other use, purpose, or intent whatever. The codicil confirmed the former will, so far as the same was not thereby altered.

Hannah survived both her husband and *Mary*; and she and *Mary* both died without issue.

The

question in the cause was, Whether, in the events had happened, the 1500*l.*, and the residue of the estate, belonged to *Hannah* absolutely, or went on her death, to the children of the testatrix's

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Vice-Chancellor decided in favour of the children and the brothers. (a) An appeal against his decree presented by the parties who claimed through *h.*

Preston, for the appeal.

testatrix in her will contemplates two events — first, of *Hannah* surviving her husband, and the second, of her dying in his lifetime. *Hannah*, if she survives her husband, is to take one moiety of the residue absolutely and absolutely, and the other moiety she leaves absolutely in contingent reversion, subject only to the interests given to *Mary* and *Mary's* children; and, in the event, the children of *Hannah* take no interest in the residue. On the other hand, if *Hannah* does not survive her husband, her children take interests in the residue, in equal parts, in case none of them should attain to the age of twenty-one. Now, the words in the codicil, “in case my daughters should happen to die without leaving issue, or children living at the time of their deaths, or leaving such, they should happen to die before they attain to the age of twenty-one,” and the disposition of her property made by the testatrix makes, if that contingency should happen, must be confined to the latter of the two events; it was only on that event that the children could take any thing; and nothing is given over to the children and brothers, except where the children of the daughters

Sim. & Stu. 344., where the will and codicil are set forth at length.


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ters might have taken. The children of the brothers are clearly postponed to the children of *Hannah*; the children of *Hannah* are altogether set aside for the sake of their mother, if the mother survives the husband: and if she would have an absolute title against her children, much more will she have an absolute title against those who are merely substituted in her children's stead,

Suppose that, *Mary* having died without leaving issue, *Hannah Killingsley*, having survived her husband, had left a child under twenty-one, it is clear, if that child afterwards attained twenty-one, that, under the will, the residue would have vested in *Hannah* absolutely; and there are no words in the codicil, which, in that state of circumstances, could be supposed to diminish her interest. Therefore, the trust which is declared in the will, for the use and benefit of *Hannah*, in case she survives her husband, is not revoked; and it is only under that trust, and not by virtue of any words in the codicil, that *Hannah* takes any interest in the residue. Suppose, again, that *Hannah's* child had died under age, but that *Mary* had left a child who attained twenty-one; in that case, too, *Hannah* would have been entitled to a moiety of the residue absolutely. But can it be reasonably supposed, that she was to take the whole or a moiety (as the case might be) absolutely, if either she or her sister had a child who attained twenty-one, and that her interest was to be cut down, in case neither she nor her sister left a child who attained that age?

The codicil does not recite the disposition of the residue which was made by the will, but only refers to it; and the clause of the codicil, on which the question arises, must be considered, not as a revocation of the residuary

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residuary bequest, but as an addition to it by way of modification. Read the will and codicil as one instrument, and this clause of the codicil would naturally find its place after the contingent bequest of *Mary's* share to *Hannah* and her children, and before the contingent limitation to the executors of the two daughters. It is not necessary to add words to the codicil. If the codicil be read and understood in its true connection with the will, the construction for which the appellants contend follows from the very words used. Even if that construction were to be fully expressed in language, we should have to insert only the words, "subject as aforesaid," after the direction that the trustees should stand possessed of the 1500*l.*, and the residue of the personal estate; and the reference made by the codicils to the will, is in substance equivalent to such words. There are many cases in which the Court has supplied a contingency, where the omission would have produced an incongruity. *Coryton v. Helyar* (a), *Willett v. Sandford* (b), *Spalding v. Spalding*. (c) Here it is scarcely necessary to supply any omission: we ask merely that words, which (to say the least) are ambiguous, may have that meaning put upon them, which is most conformable to the whole tenor of the instrument. On the other hand, to sustain the construction adopted by the decree, words must be added to that clause of the will, in which the testatrix directs that, "in case *Hannah* should survive her husband, the trustees should stand possessed of one moiety of the residue for the use and benefit of *Hannah*:" for, according to the decree, this clause is neither left untouched nor wholly revoked by the codicil, but is revoked in some events and is not revoked in others; and words must be inserted to specify and distinguish these events.

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(a) 2 *Car.* 340.

(b) 1 *Ves.* sen. 178.

(c) *Cro. Car.* 185.


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The Vice-Chancellor founds his judgment principally on the alterations made by the codicil in the disposition of the two freehold messuages, and of the 1500*l.*; and he adds, “ The purpose of the codicil, therefore, seems to be, in case of the failure of the daughters and their children, to take away the absolute interests which, by the will, would have vested in the daughters, and to substitute the *Steares* as the general objects of her bounty.” But it is a mistake to speak of the *daughters* as taking absolute *interests*; *Mary* took only her pecuniary legacy absolutely, and nothing else; *Hannah* alone took an absolute interest in the residue: and the parts of the codicil, to which the Vice-Chancellor has referred, in no respect diminish, but, on the contrary, increase the interests which the will gave *Hannah* her and her children. The devise of the estate at *Walthamstow* remains unaltered, as to her and her children. Their interest in remainder in the freehold at *Brentwood* is augmented, because the prior interest is reduced from an immediate estate tail, to a life estate, with a contingent estate tail in remainder; and a contingent interest is given them in the 1500*l.*, which the will had bequeathed absolutely to other persons. In no respect, therefore, does it appear to have been the purpose of the codicil to diminish or take away any interest which the will gave *Hannah* or her children. In fact, all that the testatrix meant in this part of the codicil was, to substitute a contingent bequest to the children of her brothers, in lieu of the contingent bequest to the personal representatives of her daughters: but she did not mean to disturb in any other respect the disposition which she had made of the residue. On the contrary, she recognizes and affirms that disposition. For, in the clause immediately preceding, she gives the 1500*l.* (subject to the interest of *Mary* and children) to *Hannah* and her children in the same manner as the will gave to her and them the moiety of the residue; and she

uses

uses not a single word which could intimate an intention to alter entirely the mode in which that moiety was to go. But, according to the decree of the Vice-Chancellor, the disposition of the moiety made by the will is to be revoked, and the 1500*l.* is to be given to *Hannah* and her children — not “in the same manner as was in the will directed touching the first moiety of the residue,” — but in a manner altogether different from, and inconsistent with, the arrangements of the will.

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Mr. *Horne* and Mr. *Seton* also argued in support of the appeal.

Mr. *Sugden* and Mr. *Shadwell*, in support of the decree, referred to the reasons assigned in the judgment of the Vice-Chancellor.

The LORD CHANCELLOR.

I see no sufficient reason for limiting those words of the codicil, in which the testatrix declares the trusts on which her trustees are to stand possessed of the 1500*l.* and the residue of her personal estate, in case both her daughters should die without leaving any child or children, or such children should all die under twenty-one. If I were to construe them in the manner contended for by the appellants, I should probably defeat the intention of the testatrix.

Decree affirmed.

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May 5.

Oct. 30.

COLEMAN v. JONES.

Previous to marriage, the fortune of the wife is so settled, as, in the event of her surviving her husband, to belong to her absolutely; and, by other deeds of the same date, the husband makes a settlement of his property, under which certain interests are given to the wife; he dies in her lifetime, having, by his will, bequeathed to her considerable benefits, which he directs shall be in satisfaction of all her claims or demands against his estate or executors under the settlement made by him, or on any other account whatsoever: the acceptance of the benefits given to her by the will does not preclude the wife from claiming a leasehold, part of her own fortune, which the husband was bound by the deed settling her fortune to renew in the name of trustees, and upon the trusts of that settlement, but which he had renewed in his own name.

UPON the marriage of *William Battersby* with *Sophia Evans* in 1776, it was agreed between them, that certain freehold and leasehold estates of *Sophia Evans* should be settled to certain uses, and that *William Battersby* should, on the marriage, receive to his own use, the residue of her fortune; in consideration of which, *William Battersby* was to settle and assure estates and money, more than equivalent in value, upon her and the issue of the marriage. In pursuance of this agreement, *Sophia Evans* executed an indenture, dated the 21st of *May* 1776, by which she conveyed and assigned her property to trustees, upon trust for Mr. *Battersby* during his life; remainder to herself for her life; remainder to such persons and for such estates as she should appoint: and in default of appointment, on trust for the survivor of the husband and wife absolutely. Among other property conveyed to the trustees under this deed, was a leasehold house in *Queen's Square, Bristol*, held of the corporation for a term of forty years, with a provision for perpetual renewal every fourteen years. *William Battersby* covenanted in the above deed, that he would from time to time during his life renew the term at the times stipulated, and that such renewals should be taken in the names of the trustees, and upon the trusts declared in that settlement.

By other indentures of the same date, *William Battersby*, on his part, in pursuance of the above-mentioned agree-

agreement, settled certain freehold and leasehold property in trust for the benefit of *Sophia Evans* and the issue of the marriage.

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William Battersby, during his life, obtained several renewals of the lease of the house in *Queen's Square*, but such renewals were taken in his own name. The last term, which had been granted to him, was still subsisting. *William Battersby* died in the lifetime of his wife. Upon his death she took possession of the house, and, not being apprized of the mode in which the renewals had been made, she bequeathed it by her will to the Plaintiff. Afterwards, the residuary devisee under *William Battersby's* will discovered, that the testator had obtained the renewals in his own name, and he claimed the property under the residuary clause of that will.

If the lease had been renewed according to the covenant of the testator, it would, in the events which occurred, have become the property of the widow, and passed under her will. But it was insisted on the part of the Defendant, that, as the widow took a beneficial interest under the will of her husband, her right was barred by the particular terms and provisions of that will. By it, *Mr. Battersby*, after bequeathing to his wife considerable personal property absolutely, gave her all his freehold and leasehold estates, and all the residue of his personal estate for life; "Provided always nevertheless," continued he, "and it is my will, and I direct, that the several estates, monies, goods, chattels, and other things, provision, and benefit, which I have by this my will given to or made for my said wife, *Sophia Battersby*, part thereof for her life, and other part thereof as her own absolute property for ever, as and in manner aforesaid, shall be in lieu and full satisfaction of and for all such of *my* freehold or *leasehold* estates, which she my said wife is,

or

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or shall or may be entitled unto, or all claims, right, or interest, which she my said wife hath, or shall or may have or make in or to all or any of *my* freehold or *leasehold* estates respectively, under or by virtue of the settlement by me made upon and previous to our marriage; also, of and for all monies which she my said wife is or shall, can or may, claim or be entitled unto under or by virtue of the settlement or articles by me made and executed upon and previous to our marriage, and also of and for all other claims and demands whatsoever, which she my said wife shall, can, or may have, be entitled unto, claim, or demand, out of or against my estate or executors, under or by virtue of the said settlement or articles by me made and executed upon or previous to our said marriage, or upon any other account, or by any other ways or means whatsoever; and that she my said wife do and shall, so soon as conveniently may be after my decease, at the costs and charges of my estate, execute and deliver a proper and effectual surrender, release, or conveyance of all such said estates, claims, rights, or interest unto the several persons to whom I have by this my will given my said estates from and after the decease of her my said wife, and also do and shall, as soon as conveniently may be after my decease, at the costs and charges of my estate, execute and deliver unto the executors of this my will a proper and effectual release of and from all such monies, claims, and demands." *Sophia Battersby* accepted the provision made for her by the above will, and executed a release pursuant to the directions which it contained.

The executors of the husband having brought an ejectment against the devisee of the wife, the latter filed a bill praying that they might be declared trustees of the term for him, and restrained from proceeding at law to recover possession of the house.

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The Vice-Chancellor pronounced a decree in favour of the Plaintiff.

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The Defendant appealed.

Mr. *Shadwell*, for the Plaintiff.

Under the settlement of the wife's fortune, the house would belong to her ; and the only question is, whether, upon the will of her husband, and her acceptance of the benefits thereby given her, any counter equity can be raised. Now, throughout the whole of his will, it is clear that the husband was referring to *his* property, and the settlement which he had made of it, and the claims which, under that settlement, she might have upon it. The words which he uses are, " My freehold and leasehold estates." This house never was his leasehold estate ; he could not make it his, by taking the renewals in his own name. Neither did the interest which the wife had in it, arise under the settlement made by him. It was derived from the settlement which she had made of her own fortune. The general words, which follow, do not apply to more than demands against his estate. Here the Plaintiffs demand nothing against his estate : they merely call upon his executors to give effect to a trust.

Mr. *Horne* and Mr. *Whitmarsh*, for the Defendant.

Mr. *Battersby* treated this house as his own during the whole of his lifetime ; it was, in a legal sense, *his*, at the time of his death, though subject to a trust in equity ; and he must be considered as having intended to include it, when he speaks in his will of his estates or his leaseholds.

The different indentures, by which the fortunes of the husband and the wife respectively were assigned to trustees

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trustees upon certain trusts, cannot be regarded as different settlements. They were parts of one transaction, and constitute one settlement. In this sense, the claims of the wife under the indenture which conveyed her property, are claims under a settlement made by the husband.

The benefits given to the wife by the will are expressly declared to be in lieu of all claims or demands which "she can have against my estate or executors upon any account whatsoever." This bill asserts a demand against his executors; and, therefore, is inconsistent with the proviso of the will.


Oct. 30.

The LORD CHANCELLOR.

It was contended; that, as the testator had expressly declared in his will, that the provision thereby made for his wife, should be in lieu of all her claims in the terms therein mentioned, it was meant to extend to the house in *Queen's Square*, the lease of which had been renewed by him in his own name, and which he had thus treated as belonging to himself. But the proviso, with the exception of some general words at the end of it, to which I shall presently advert, is, I think, confined, in point of construction, to rights and claims under the settlement made by the testator, and does not extend to claims arising out of any covenant on his part contained in the settlement made by his wife upon the marriage. The words are, "under the settlement made by me," followed afterwards by the words "under the said settlement," with reference to the former limitation.

As to the general words to which I have alluded, and upon which reliance has been placed, viz. "or upon any
other

other account, or by any other means whatsoever," without deciding upon the extent of the application of them in any other case, it will be sufficient for the present purpose, to consider the situation in which the testator stood with reference to the property in question. In renewing the lease in his own name, he must be taken to have renewed it for the benefit of the parties entitled to it. By so doing, he became himself a trustee of the term for the purposes contained in the settlement. It formed no part of his estate, beyond the interest which he took in it under that settlement, and which ended with his life. He had no further beneficial property in the lease.

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To give effect to this trust cannot, I think, be considered as a claim either against the estate of the testator or against his executors, within the meaning of the general words to which reference has been made, or of any other part of the proviso.

The stipulation as to the release does not carry the case further, or change the view I have taken of it. I think, therefore, that the decree must be affirmed.

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May 9. 17.

MORRIS v. DAVIES.

Where a party wishes to obtain a new trial of an issue, he must first, on an *ex parte* application, satisfy the Judge in equity, that there is a reasonable ground for sending to the Judge who tried the issue for his notes of the trial.

AN issue had been tried; and, it being the intention of the Defendant to apply for a new trial, a doubt was raised, whether the party applying for a new trial ought in the first instance to satisfy the Court, on an *ex parte* statement, that there was a sufficient ground for desiring the Judge, before whom the issue had been tried, to send his notes of the trial to the Lord Chancellor; or whether the Lord Chancellor would at once, and as a matter of course, without hearing any statement of the case, send for the notes, merely, upon the ground that an application for a new trial was to be made.

The LORD CHANCELLOR observed, that, if the counsel of the party, who was dissatisfied with the verdict, did not, when stating the case *ex parte*, raise a reasonable doubt in the mind of the Court, there could be no necessity for imposing on the Judge the trouble of sending his notes of the trial; and he was, therefore, inclined to think that the proper course of proceeding was, to make, in the first instance, an *ex parte* application for the Judge's notes, supporting that application by such a statement as to satisfy the Court that it ought to be granted.

Mr. *Heald* stated, that, according to his recollection of the practice, the Judge in equity would send for the notes of the trial, without requiring counsel to shew any specific ground for so doing. He could not call to mind a single instance, in which he had ever heard counsel go into the circumstances of a case, in order to shew

show that the Judge's notes ought to be sent for. A party had a right to move for a new trial; and as the notes of the Judge were wanted for the satisfaction and assistance of the Court, rather than for any other purpose, the mere fact that such a motion was about to be made would induce the Court to take the proper means for being furnished with so necessary an assistance. The only practical effect of introducing into the course of procedure in equity, on motions for new trials, a step analogous to the rule *nisi* for a new trial at law, would be to occupy the time of the Court with unnecessary statements, and to load the suitor with additional expenses.

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The LORD CHANCELLOR stated, that the course of proceeding was, to make an *ex parte* application for the Judge's notes, shewing a reasonable ground for questioning the verdict. His Lordship added, that he had spoken with the Vice-Chancellor on the subject, and that his Honour had stated, that the practice was so settled by Lord *Eldon*, after consultation with one of the Lords Chief Justices.

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May 11.

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CLARKE v. FAUX.

In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase-money on a day specified, "upon the vendor's making a good title, or, otherwise, if such title should not be then completed, upon his executing a bond to complete such title, and to convey the estate as soon as the same could be completed:" the vendor is bound to shew a good title; and, till a good title is shewn, the purchaser, though he had entered into possession, is not bound to pay the purchase-money.

JOHN KENT having been declared a bankrupt in *February* 1819, *Eagle Willett* and two other persons were chosen assignees of his estate and effects; and they, on the 27th of *April*, put up to sale by auction a dwelling-house and appurtenances, which had been part of his property. By the conditions of sale, the purchaser was to pay a deposit of 10 per cent. on the purchase-money, and to sign an agreement to pay the remainder on the 24th of *June*, on having a good title made to him. *Willett*, the assignee, employed an agent to bid for him at the sale, and became the purchaser; and, soon after, he took possession of the property.

On the 1st of *May* 1819, *Willett* entered into a contract for the sale of the estate to *Clarke*, the Plaintiff, for the sum of 900*l.*: 300*l.*, part of the purchase-money, was paid down; in consideration of which, and of 600*l.* to be paid by the Plaintiff at the time specified in the conditions of the previous sale, (at which, it was stated, that *Willett* had purchased the property), *Eagle Willett* agreed to convey or surrender the premises to the Plaintiff conformably to such conditions of sale.

On the same day *Clarke* entered into possession. After he had been put into possession, a dispute arose respecting some articles on the premises, which had belonged to the bankrupt. But at length, on the 5th of *June* 1819, an agreement was entered into between the Plaintiff and *Willett*, in which it was stipulated, that the Plaintiff should pay the assignees a certain sum for the property in dispute: and the Plaintiff

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Plaintiff further agreed "to pay to *Willett* on the 25th of *December* then next, the sum of 600*l.*, the residue of the purchase-money for the estate, together with the legal interest thereon from the date therein mentioned, upon *Eagle Willett* making a good title to the premises; or, otherwise, if such title should not be then completed, upon *Eagle Willett* executing at his own expense a bond to complete such title, and to convey the estate as soon as the same could be completed." The Plaintiff refused to pay the money at the appointed time, not having been satisfied that *Willett* could make a good title to the property. *Willett* brought an action on the agreement of the 5th of *June*, and obtained a verdict for 690*l.* Shortly afterwards he became a bankrupt, and the Defendants were his assignees.

It was stated that neither *Willett* nor his assignees could make a good title.

The bill prayed, among other things, that it might be referred to the Master, to inquire whether *Willett* or his assignees could make a good title to the premises; and in case such title could be made, that the agreement might be specifically performed: but if a title could not be made, that the contracts might be delivered up to be cancelled; that the Defendants might be ordered to repay to the Plaintiff the 300*l.* with interest, and that he might be declared to have a lien on the premises to that amount, (he offering on his part to deliver up possession of the premises, and to allow a proper compensation for his occupation thereof since the 1st of *May* 1819); and that the Defendants might be restrained from further proceeding in the action brought upon the agreement.

The Defendants by their answer stated, that *Willett* had executed and tendered to *Clarke* a bond in the penal

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sum of 1200*l.*, conditioned to be void, if he, “ *Willet*, his heirs, &c. as soon as the same can be completed, and without any unnecessary delay, shall make and deduce a good title to the premises, and convey them to *Clarke* and his heirs.”

An injunction had been granted, upon payment of the amount of the verdict into court.

Upon the hearing of the cause, Sir *John Leach*, Vice-Chancellor, ordered, that it should be referred to the Master, to inquire whether a good title could be made to the property.

From that decree the Defendants appealed.

Mr. *Sugden* and Mr. *Andrews*, in support of the appeal, contended, that, according to the true construction of the second agreement, the Plaintiff was bound to take the property, whether a good title could be shewn or not. He had undertaken to pay the residue of the purchase-money on the 25th of *December* 1819; and the stipulation was, that, if the title could not be completed on that day, he was to rely on the vendor's bond. The bankruptcy, which had occurred subsequently, did not alter the rights of the parties.

Mr. *Heald* and Mr. *Bickersteth*, *contra*.

It is absurd to construe this agreement as a contract to purchase an estate without a title. The intention of the parties was, that a good title should be shewn; otherwise, why stipulate for a bond, by which the vendor was to enter into a special obligation to complete the title? How can a title be completed, if the vendor cannot make a good title? Without a particular stipulation, the vendor would not be entitled to receive his money, till the conveyance was made: and the purpose of this agreement was, that
he

he should be paid on the 25th of *December*, though the conveyance was not then made; subject, however, always to his shewing that he was in a condition to make a title. The purchaser was to trust to the bond, not as a substitution for the title, but as a means, after the vendor had shewn that he could make a title, of compelling him to exert diligence in its formal completion.

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In this case the argument turned upon the construction of the agreement of the 5th of *June* 1819. It was contended that the residue of the purchase-money was to be paid at the time specified, without regard to the question, whether or not *Willett* or his assignees could eventually make a good title to the premises; that this was the meaning of the parties, and the true interpretation of the agreement. I think, however, that the agreement is not to be so construed. I conceive the meaning of the parties, as collected from the terms of the contract, to have been, that the money was to be paid on the day named, although the title might not then be completed; but subject always to this condition, that the vendor had the power to complete it; and that it was not intended that it should be paid, if the vendor did not possess such power. The stipulation as to the bond was merely intended to guard, upon the money being paid, against supineness and delay in doing that which, it was assumed, the vendor had the means of doing, and which, by the agreement, I conceive, he engaged to do, viz. to make a good title to the estate. I think, therefore, that the question as to the title was properly referred to the Master.

Decree affirmed.

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HINDMARSH v. SOUTHGATE.

If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account cannot be directed in respect of his receipts during his infancy.

THIS was a suit by creditors for the administration of the assets of *Richard Abbott*, who died intestate in *February 1816*.

The bill alleged that *Mary Ann Abbott*, the widow of the intestate, at the suggestion and by the procurement of *John Southgate*, her father, obtained letters of administration to her husband's estate; that *John Southgate*, in her name, and under colour of the letters of administration, carried on the business of a tavern-keeper in premises which the intestate was in possession of at the time of his death, and collected a great part of his personal estate; that the widow and her father disposed of the stock in trade of the deceased, and of the lease of the premises, and had applied the proceeds to their own use; that the Plaintiffs had brought actions to recover the amount of debts due to them from the testator, and had obtained verdicts; that *John Southgate* then procured the letters of administration, which had been granted to *Mary Ann Abbott*, to be recalled, on the ground that she was an infant; and that he had himself obtained letters of administration to *Richard Abbott* during her minority. The prayer was, that *John Southgate* might account for the assets which he had received as well before as after he had taken out administration; and that he might be charged, as in the nature of an executor *de son tort*, with such parts of the intestate's assets as he, or any person by his order or procurement, had received, before he was clothed with the character of personal representative.

Mary

Mary Ann Abbott, by her answer, stated that she was still an infant, and submitted her rights to the Court.

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John Southgate, by his answer, asserted, that it was not at his suggestion, or by his procurement, that *Mary Ann Abbott* had taken out letters of administration to her husband, and interfered with the assets, but at the request of trustees, who had been appointed, at a meeting of the creditors, to superintend the management of the affairs of the intestate; and that, when the letters of administration granted to her were recalled, he himself took out administration, as being a creditor of the intestate to a large amount. He had been one of the sureties in the bond for his daughter's due administration.

Pending the suit, *Mary Ann Abbott*, having attained her full age, procured letters of administration to the estate of *Richard Abbott* to be granted to her, and intermarried with *Meller*. A supplemental bill was filed, praying an account against her.

On the 18th of *November* 1822, the Vice-Chancellor made a decree, directing "an account of the personal estate of *Richard Abbott* come to the hands of *Mary Ann Abbott* before her marriage with *Meller* or since such marriage, or by any other person or persons by their or either of their order, or for their or either of their use; and in taking such account the Master was to distinguish what was possessed by her or by her order, or for her use, before she attained twenty-one, and what had been so possessed since that time." An account was also directed of the personal estate possessed by *John Southgate*, or any person or persons, &c., and of the application thereof, with liberty to the Master to state special circumstances.

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The Defendants appealed, insisting that the Court ought not to have directed any account as to the payments, receipts, or other acts of *Mary Ann Abbott* during her infancy.

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The cause was argued before Lord *Eldon*, by Mr. *Heald* and Mr. *Wray* for the Appellants, and by Mr. *Hart* and Mr. *Roupell* in support of the decree: and afterwards before Lord *Lyndhurst*, by Mr. *Heald* and Mr. *Wray* on the one side, and Mr. *Pepys* and Mr. *Roupell* on the other.

It was contended, in support of the appeal, that, as an infant could not be lawfully clothed with the character of administrator, no account could be directed against an infant in respect of assets received by him during his infancy, under the improper assumption of the character of administrator; and the cases, referred to in *Bacon's Abridgement — Executors and Administrators, A. 7. B. 1.*, — were cited. The account, therefore, against *John Southgate*, ought to commence only from the time when he obtained administration *durante minoritate*; and against *Mary Ann Abbott*, from the date of the administration granted to her after she had attained twenty-one.

On the other hand, it was said, that to direct a partial account of assets would be an anomalous proceeding. It was clear that the Defendants had interfered with and disposed of assets, before the date of the administration *durante minoritate*: ought there not, therefore, to be an inquiry concerning the assets generally, which had been received by them, or by any person for their use? *Mary Ann Abbott*, during her infancy, might have sold part of the assets, and purchased other property, which she might have sold again; and she might not have received the price, till after she attained twenty-one. Would she
 not

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not be accountable for the money so received? But, in fact, the decree did not declare to what extent either she or *Southgate* was to be charged: it merely directed inquiries, in order to ascertain what part of the assets had been received by them respectively; and upon the report, every question as to their liabilities in respect of their receipts would be determined. Such was the view which the Vice-Chancellor took of the case.* Even if the creditors should be unable to obtain a decree for payment against *Mary Ann Abbott* in regard of sums received as administratrix during her infancy, they may not be without remedy against her sureties.

The order made on the appeal was as follows: —

“ His Lordship doth order that so much of the bill as seeks to have an account taken of the personal estate of *Richard Abbott* prior to the time when *John Southgate* became the personal representative of the said *Richard Abbott*, during the minority of *Mary Ann Abbott*, do stand dismissed; and doth therefore order that the decree be varied, by directing the Master to take an account of the personal estate of the intestate come to the hands of *John Southgate*, or of any other person or persons by his order, or for his use, since he became the personal representative of the intestate under and by virtue of the letters of administration *durante minority* of *Mary Ann Abbott*, instead of taking the account of the personal estate of the intestate against the said Defendant, as directed by the decree. And it is ordered that the said decree be also varied, by directing that the

Master

* From a note taken by the reporter, of what was said by the Vice-Chancellor, at the hearing of the cause, it appears, that his Honor stated that, in his opinion, the infant could not be charged in respect of her receipts during her minority.

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Master do take an account of the personal estate of the intestate come to the hands of the said Defendant, *Mary Ann Abbott*, (now *Mary Ann Meller*) or of any other person or persons by her order, or for her use, since the second letters of administration were granted to her, after she attained the age of twenty-one years, instead of taking an account of the personal estate of the intestate against her as directed by the decree: and with the aforesaid variations, it is ordered that the decree be affirmed," &c.

Reg. Lib. 1826. A 1679:

May 14. 16.

ATTORNEY-GENERAL v. MILL.

A Scotchman, by a will in the *English* form, made in *England*, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in *Scotland*, upon trust to lay out the same in the purchase of lands, or rents of inheritance in fee simple, for the intent expressed in an


DAVID MILL, the testator, was a native of *Montrose*.

Having acquired a considerable fortune in the *West Indies*, he returned to *Scotland* about the year 1786, and took up his abode in his native town. In 1791, he made a journey to *London*, in order to transact some business; and, being attacked by a sudden illness, he there made his will, dated the 5th of *December*, whereby he gave and bequeathed his estate or plantation, situate in the island of *Cariacou*, with the lands, slaves, hereditaments, and appurtenances thereto belonging, (subject to an annuity or rent-charge of 300*l.* therein after mentioned,) and all other his estates and effects, both real* and personal, not thereafter, or by any codicil

instrument of even date with his will; and by that instrument, he directed the trustees of his will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of *Montrose*, to be by them applied to the relief of indigent ladies in *Montrose*, or within twenty miles of that town: Held, that the bequest was void under the mortmain act.

* It was stated at the bar, that of his will, any real estate in the testator had not, at the date *England*.

codicil thereto, specifically bequeathed, unto his cousin *James Mill*, of *Camberwell*, in the county of *Surry*, Esq., his brother, *George Mill*, of *Montrose*, in *North Britain*, and his cousin, *Hercules Mill*, of the same place, Esq., and Doctor *Patrick Bartlett*, of *Cariacou*, and the survivor or survivors of them, his heirs, executors, administrators, or assigns, upon trust, out of his personal estate, to pay his debts, funeral expenses, legacies, and certain annuities, and to apply a perpetual yearly rent-charge of 300*l.*, to be issuing out of his plantation in the island of *Cariacou*, in such manner as to them should appear best calculated to meliorate the situation of the slaves which should from time to time be upon that estate.

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The testator then proceeded to dispose of the residue of his real and personal property in the following words: —
 “As for all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature or kind soever, — subject and charged and chargeable as aforesaid, and also subject to any legacies which I may give by any codicil to this my last will, and also subject to all such costs, charges, and expenses as my said trustees and executors, hereinafter named, should bear, pay, sustain, or be put unto, in or about the execution of the trusts hereby in them reposed, — I give, devise, and bequeath the same, and every part thereof, unto the said *James Mill*, *George Mill*, *Hercules Mill*, and *Patrick Bartlett*, upon trust, that they my said trustees, and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall, as soon as conveniently may be, invest such part of my said estate as shall not then consist of real estate, in the purchase of lands or rents of inheritance in fee-simple, which purchase or purchases shall be made in the names of the said trustees, or the survivors or survivor of them, and by them, in due and legal form,
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conveyed from time to time, together with such part or parts of my real estate as may then happen not to be sold or disposed of for the purposes aforesaid, to other trustees and their heirs, so as at all times hereafter to support and preserve a perpetual succession in the lands and rents so to be purchased, and such parts of my real estate as may not have been sold or disposed of, for the intent and purpose mentioned, contained, and expressed in a certain instrument or writing by me executed, bearing even date herewith." He appointed the said *James Mill, George Mill, Hercules Mill, and Patrick Bartlett*, his executors.

The instrument, referred to by the will, was a deed poll, dated the 5th of *December* 1791, and attested by two witnesses, in which the testator, after describing himself as formerly of the island of *Cariacou* but then residing in the parish of *Mary-le-bone*, in the county of *Middlesex*, and reciting that he had often observed with regret the destitute situation in which the daughters of many gentlemen in the neighbourhood of *Montrose* had been left at the death of their fathers, declared, "that the gift, devise, and bequest of all the rest, residue, and remainder of my said estate and effects to the said *James Mill, George Mill, Hercules Mill, and Patrick Bartlett*, and the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor, was so made and given them, upon trust, that they, and the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall, yearly, and every year for ever, pay the yearly rents of my said estates into the hands of the following persons, their heirs and successors, (that is to say) the two persons who for the time being shall be my nearest of kin, and residing within twenty miles of the town of *Montrose*; the said *James Mill* and his heirs,

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when residing within the said distance; Sir *Alexander Ramsay*, of *Balmain*, Baronet, and Sir *David Carnegie*, and their heirs, when he or they shall reside within the said distance; and to the magistrates of *Montrose* for the time being; it being my desire and intention, that neither of my said trustees, or their heirs, assigns, or successors, shall act in execution of the trusts hereinafter mentioned, but such as shall reside and live within twenty miles of the town of *Montrose* aforesaid, to be, by the said trustees, their heirs and successors, applied" in the manner therein mentioned, towards the relief and comfort of indigent ladies residing in *Montrose*, or within twenty miles of *Montrose*. "And for the more effectually carrying into execution," continued the testator, "the several trusts hereinbefore mentioned, and for establishing a method whereby the same may be from time to time kept on foot, for the more regular and sure payment and distribution of the several annual sums and charitable donations to the respective description of persons before pointed out and mentioned as the proper objects of a bountiful assistance, I do hereby empower, authorise, and direct, that, when any of my said trustees shall die, or discontinue to live and reside within twenty miles of *Montrose* aforesaid, or be desirous of not acting in or relinquishing his trust, it shall and may be lawful for the real surviving acting trustees, or a majority of them, from time to time to elect and choose one or more person or persons to act and be joined with them in the execution of the trust aforesaid, in the room or stead of him or them so dying, or becoming non-resident, or resigning as aforesaid; and to make and invest him or them with a full power, authority, and direction, as if he or they were hereby particularly named or appointed. And in case it shall at any time hereafter happen that the number of voices shall be equal in any matter or subject relative to the execution of the trusts hereby created,

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created, I do hereby declare, that the trustee, who shall be nearest of kin to me, shall, upon all such occasions, have the casting vote; and if there shall be no such next of kin to me a trustee at the time, then the eldest or senior trustee shall have the casting vote. And I do hereby particularly recommend to my said trustees, and the survivor or survivors of them, their heirs, assigns, and successors as aforesaid, whenever any vacancy shall happen as aforesaid, to elect some of my next of kin as trustees of this bounty, besides the two nearest of kin who may then happen to be trustees, if any can be found *resident within twenty miles of Montrose* aforesaid, and shall be adjudged by the majority of my said trustees to be fit and proper persons to act in the execution of the several trusts aforesaid.”

The testator afterwards took up his residence in *Bath*, and made several codicils to his will. By the first of these codicils, dated in *July* 1799, he appointed his brother, *John Mill*, of *Fearn*, in the county of *Angus*, a joint executor with *James Mill*, *George Mill*, *Hercules Mill*, and *Patrick Bartlett*: and he nominated the said *John Mill*, his heirs and successors, joint trustees under the deed with *James Mill*, *George Mill*, and *Hercules Mill*, and *Patrick Bartlett**, and the said *Sir Alexander Ramsay* and *Sir David Carnegie*, thereby giving and granting unto him, and his heirs and successors, full power and authority to act under the same as fully and effectually, to all intents and purposes, and in all respects, as they the said *James Mill*, *George Mill*, *Hercules Mill*, and *Patrick Bartlett*, and the said *Sir Alexander Ramsay* and *Sir David Carnegie*, could or might do.

In

* The codicil was so stated in the deed, were trustees under the will, and not under the deed. Some of the persons here referred to as trustees under

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In *September* 1800, he made a second codicil, by which, —after reciting that he had bequeathed his plantation in *Cariacou*, subject to the rent-charge of 300*l.*, and all other his estate and effects, both real and personal, upon trust, out of the rents, issues, and profits of his real estates, or by sale thereof, to pay his debts, funeral charges, legacies, and certain annuities, — he revoked and made void the said devise and bequest. He then directed, that his debts, funeral expenses, legacies, and the general annuities given by his will, should be paid out of his personal property ; and he bequeathed the estate or plantation in *Cariacou* unto *George Mill*, *John Mill*, and *George Gavin Browne*, their heirs and assigns, in equal shares, subject to the payment of the annuity of 300*l.* per annum.

By a third codicil, dated in *June* 1802, the testator, after mentioning the death of *George Mill*, devised the plantation in *Cariacou* to *John Mill* and *George Gavin Browne*, and their heirs, in equal moieties ; “ and,” continued the testator, “ as to all the rest, residue, and remainder of my monies, and securities for money, stock in the public or government funds, mortgages, and estates in mortgage, and other securities for money, effects, and premises whatsoever, not before given and bequeathed by my said will and codicils, I give and bequeath the same and every part thereof unto my said brother *John Mill*, and the said *George Gavin Browne*, their executors, administrators, and assigns, to be equally divided between them, share and share alike.” He appointed his brother *John Mill*, and *George Gavin Browne*, executors of his will and codicils, and confirmed the appointment in his will of *James Mill*, *Hercules Mill*, and *Patrick Bartlett* to be trustees thereof.

A fourth codicil, dated in *March* 1803, gave some small legacies.

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The testator died in *December* 1804. *John Mill* and *George Gavin Browne* proved his will and codicils.

In 1806, *Browne* filed a bill in the Court of Chancery against *John Mill*, *Patrick Bartlett*, and the *Attorney-General*, insisting that the devises and bequests of the rent-charge on the plantation in *Cariacou*, for the amelioration of the condition of the slaves, and of the residue of the real and personal estate for the purposes expressed in the deed of the 5th of *December* 1791, were void, and that he and *John Mill* were entitled to the residue under the subsequent testamentary instruments; and praying, among other things, declarations to that effect.

In 1808, a decree was pronounced at the Rolls, directing the usual accounts of the personal estate to be taken; and, on the 13th of *June* 1809, a decree was made on further directions, which, without alluding to the charitable bequests, or containing any declaration as to their validity, provided for the payment of the testator's debts and legacies and of the general annuities which he had bequeathed, and directed one moiety of the residue to be transferred to *George Gavin Browne*, and the other moiety to *John Mill*.

During these proceedings, no notice of the purport of the will, or of the deed of even date with it, had been given to any person interested in the establishment of the charity; and it did not appear that there had been, at either of the hearings, any argument or discussion as to the validity or invalidity of the bequest for the relief of indigent ladies in *Montrose* and the neighbourhood. At length, the magistrates of *Montrose* were informed of the contents of the will and deed; and, in 1823, the Attorney-General, on
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their relation, filed an information, praying, that it might be declared, that, under the direction to lay out the residue of the personal estate of the testator *David Mill*, in the purchase of lands or rents of inheritance, for charitable purposes to be executed in *Scotland*, as expressed in the deed of 1791, the trustees for the time being were authorised and empowered, or had the option, to purchase, for these purposes, lands or rents of inheritance in fee-simple in *Scotland*, and that directions might be given for applying the residue of the personal estate in making such purchases.

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To this information *Browne* filed a general demurrer, with a view of insisting that the decree on further directions was a bar to the present proceedings. But as the information did not state that the Attorney-General had been a party to the prior suit, it was found, when the demurrer came on to be argued, that the question could not be disposed of in that form; and it was suggested that the more convenient mode of raising the substantial question would be, that *Browne* should withdraw the demurrer, and put in a plea of the former decree, and that the Attorney-General should at the same time present a petition of appeal against that decree.

This course was accordingly adopted: and, on the plea and petition of appeal against the decree of 1809, the question was, whether the bequest of the residue of the personal estate, for the purposes expressed in the deed of the 5th of *December* 1791, was void under the 9 G. 2. c. 36.

Sir *Charles Wetherell* and Mr. *Sugden*, in support of the bequest.

The testator was a *Scotchman*; two of the trustees named in the will, and the trustee, *John Mill*, appointed
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by a codicil, resided in *Scotland*; the objects of the charity are exclusively *Scotch*; and the most anxious care has been taken, that the administration of the charity shall be conducted solely by persons residing in *Scotland*. Under these circumstances, the probability is, that the testator meant, that the lands or rents of inheritance should be purchased in *Scotland*; at least he must have intended that the trustees should have an option of making the purchases there. This inference is corroborated by the use of the phrase, "rents of inheritance," which is more applicable to property in *Scotland* than in *England*; for fee farm rents are the only species of *English* hereditaments which would answer that description, and the amount of the fund was far too considerable for such a species of investment. Suppose the trustees had actually laid out the money in the purchase of lands in *Scotland*, would this Court have made them answerable for a breach of duty, condemned them for not defeating purposes for which they were expressly declared trustees, and compelled them to account for the residue to the residuary legatees or the next of kin? As it is a foreign charity which the testator has here created, this Court could not have interfered with its administration*, nor settled a scheme for the application of the fund, nor regulated in any degree the mode of distribution, or the selection of the individuals who were to have the benefit of it. On what pretext, then, can it be said, that the property must be kept within the jurisdiction of this Court? If the trustees, in the execution of the trust reposed in them, might purchase lands in *Scotland*, the bequest must be sustained. *Oliphant v. Hendrie* (a), *Mackintosh v. Townsend* (b), *Attorney-General v. Stewart*. (c)

Where

(a) 1 Bro. C. C. 571. (b) 16 Ves. 330. (c) 2 Mer. 143—163.

* *Emery v. Hill*, 1 Russ. 112. *Minet v. Vulliamy*, *ibid.* 118.

Where a will leaves executors or trustees at liberty to execute a charitable gift in either of two modes, and the trusts may be lawfully executed in one of these modes, while, in the other, it would be defeated by the statute of mortmain, the Court has taken, and has held that the trustees or executors are bound to take that course which will give effect to the charity*; and it makes no difference, whether the option between two modes of proceeding is given by express words, or is implied by a reasonable implication from the language of the will and circumstances appearing on the face of it.

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Mr. Horne and Mr. Lynch, contra.

The testator has appointed two sets of trustees; one set, the trustees under his will, in whom the property is to be vested; the other, the trustees under the deed, who are to receive the rents from the trustees under the will, and to apply the money in the manner prescribed by that deed. This second class of trustees, it is true, are to be persons resident in *Scotland*; but they are not to have any concern with the investment of the fund or any interest in the lands or rents which are to be purchased. The appointment of two sets of trustees, — the one to have the control of the property, — the other, to have the distribution of the income of that property among the objects of the testator's proposed bounty, — removes any presumption, that the property was to be laid out in *Scotland*, which might have been supposed to have been ordered by the nature of the purposes to which the income was to be applied; and, on the contrary, as the testator has expressly directed, that the trustees, who are to distribute the income, shall be persons resident in *Scotland*,

* *Curtis v. Hutton*, 14 *Ves.* 537.

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Scotland, but has not made a similar provision with respect to the trustees in whom the property is to be vested, the fair inference is, that he did not contemplate residence in *Scotland* as a circumstance in any way connected with the trust reposed in the latter. This is, therefore, simply the case of a bequest to certain persons in trust to purchase lands, and to pay over the rents for charitable purposes to persons resident in *Scotland*; the trust to purchase lands could be executed only by the purchase of lands in *England*; and the consequence is, that the bequest is void.


Mr. *Lynch*, also, contended that the third codicil revoked the residuary bequest in the will, and made a new disposition of the residue.

The LORD CHANCELLOR.

If it was the intention of the testator to give the trustees power to lay out the residue of his personal estate in the purchase of lands either in *Scotland* or *England*, the gift to charity will be good; and it is perfectly clear that it is not necessary, that the testator should have expressed, in positive and distinct terms, that the trustees were to have that option. If I could collect from any part of the will that it was his meaning or in his contemplation, that his trustees should have an option of buying lands and rents of inheritance either in *Scotland* or in *England*, I should give effect to his intention.

As to the argument against the charity, drawn from the appointment of two sets of trustees, I must observe, that two sets of trustees would have been equally necessary, even if it had been the intention of the testator that the lands should be purchased in *Scotland*, unless

as he had required that the purchase should be made, not merely in *Scotland*, but within twenty miles of *Montrose*.

1827.

 ATTORNEY-
 GENERAL
 v.
 MILL.

Looking, however, at every part of the will, — a will, & it be recollected, made in *England*, and in the *English* form, and which says nothing as to the laying out of the money in *Scotch* purchases, — I do not see enough to induce me to suppose, that the testator contemplated the purchase of lands in *Scotland*.

The LORD CHANCELLOR stated, that, having again read over the will, he continued to be of the opinion which he had expressed before, and therefore the bequest of the residue to charitable purposes was void.

May 16.

The plea was allowed; and, on the petition of appeal, was ordered, that the decree of the 13th of *June* 1809 should be affirmed.

1827.

BAKER v. HANBURY.

A legacy was given to the separate use of a married woman during the joint lives of her and her husband, and in case she survived him, to her absolutely, but if she did not survive him, to such person as she should by will appoint, and in default of appointment to her next of kin, exclusive of her husband: she died in the lifetime of her husband and the testator: Held, that the legacy lapsed.

THE will of *John Baker* contained the following bequest:—

“And as to my personal estate my will is, that my executors do invest the sum of 10,000*l.* sterling in the purchase of stock in the public funds in their own names, upon trust, to pay the dividends thereof, as the same shall become receivable, into the proper hands of my nearest relation, the said *Ann Reed*, or authorize her to receive the same for her sole and separate use, for and during the joint lives of herself and her said husband, the said *Gilfred Lawson Reed*; which dividends shall not be in the least subject to the debts, control, or engagements of her said husband; and, in case the said *Ann Reed* shall survive the said *Gilfred Lawson Reed*, upon trust that my said executors do forthwith transfer the whole of the stock that shall have been purchased with the said 10,000*l.* sterling and the unapplied dividends thereof, to her the said *Ann Reed*, for her own use absolutely; and, in case the said *Ann Reed* shall depart this life in the lifetime of the said *Gilfred Lawson Reed*, upon trust to transfer such stock, and pay the unapplied dividends thereof to such person or persons for such use or uses, and in such manner and form, as she the said *Ann Reed* shall, in and by her last will and testament, or any writing purporting to be her last will and testament, under her hand, notwithstanding her coverture, order, direct, or appoint, give or bequeath the same; and in default of such direction or appointment thereof, shall and do transfer and dispose of the same, or so much or such part thereof as shall not be so appropriated or disposed, and pay

re unapplied dividends thereof, to such person or persons (exclusively of the said *Gilfred Lawson Reed*), as could be entitled thereto under the statute of distributions, as the next of kin of her the said *Ann Reed*, if she the said *Ann Reed* had died possessed thereof a widow and intestate," &c.

1827.
BAKER
&
HAMBURY.

Ann Reed died in the lifetime of the testator and of her husband, leaving a daughter, her only child. This daughter had married the plaintiff *Baker*; and she, in conjunction with her husband, as being the sole next of kin of her mother, claimed by the present bill payment of the legacy of 10,000*l*.

The question was, whether the legacy lapsed by the death of *Ann Reed* in the testator's lifetime, or went to the person or persons to whom the money was directed to be paid, if *Ann Reed* made no appointment.

The decree of the Vice-Chancellor declared, that the legacy had lapsed.

The plaintiffs appealed.

Mr. *Shadwell*, in support of the appeal.

In the event which happened, — the death of *Ann Reed* in her husband's lifetime, — the bequest is to her for life, with a power of appointment; remainder, if she made no appointment, to her next of kin, exclusive of her husband. The gift to the next of kin is distinct from any interest given to her, and, therefore, cannot be affected by her death. *Perkins v. Micklethwaite.* (a)

Mr. *Sugden* and Mr. *Wakefield*, *contrâ*.

The object of the testator was, that Mrs. *Reed* should have the whole beneficial interest in the 10,000*l*., but so as

(a) 1 *P. Wms.* 275.

1827.

BAKER
v.
HAMBURY.

as to exempt it from marital control. He has, therefore, given it to her separate use during the joint lives of her and her husband, and if she survive her husband, she is to take it absolutely; if she does not survive her husband, she has a general power of appointment by any writing in the nature of a will; and if she makes no appointment, her next of kin are to be entitled. The limitation to the next of kin is a mere substitution for the power of appointment. The next of kin are put in the place of the appointees of this lady; they can take only what she might have appointed; she could have appointed nothing, because she died before the testator and their claim must, therefore, fail entirely. *Calthorp v. Gough* (a), *Humberstone v. Stanton*. (b)

Mr. Shadwell, in reply.

In *Calthorp v. Gough*, the legacy was given to Lady Gough absolutely, if she survived her husband: she did survive him, and, therefore, if she could not take the legacy, no other person could claim it; and, as she afterwards died in the testator's lifetime, the bequest necessarily failed. So, here, if Mrs. Reed had survived her husband, and then had died before the testator, the legacy would have failed; because, as she survived her husband, no one, except her, could have had any title under the will; and she could have had no title, because she did not survive the testator. The distinction of the present case is, that, in the events which have happened, Mrs. Reed had merely a life-interest in this sum of 10,000*l.*, with a limitation over to her next of kin, subject only to be defeated by the exercise of her power of appointment.

The

(a) 5 Bro. C. C. 395. n. 4 T. R. 707. n.

(b) 1 V. & B. 335.

The LORD CHANCELLOR was of opinion, that the legacy was intended to be an absolute bequest to Mrs. *Reed*, but that it was qualified on account of her situation as a married woman ; and he referred to the observations of Lord *Alvanley*, in his judgment in *Calthorpe v. Gough*. He held, therefore, that the legacy had lapsed ; and he affirmed the decree of the Vice-Chancellor.

Reg. Lib. 1826. A. 1293.

1827.

BAKER

v.

HANBURY.

May 19.

HENVELL v. WHITAKER.

ROLLS.

May 14. 31.

WILLIAM WHITAKER began his will in the following words : — “ First, I will and direct that all my just debts and funeral expenses be fully paid and satisfied by my executor hereinafter named.” The testator then proceeded to give certain pecuniary legacies and an annuity which was to be issuing out of a specified term ; and he concluded as follows : “ All my real, personal, and copyhold estates whatsoever and wheresoever, subject to the above-mentioned legacies and annuity, I give, devise, and bequeath to my nephew *William Whitaker*, to hold to him, his heirs, executors, administrators, and assigns ; and I appoint him executor hereof.”

The question in the cause was, whether the testator had charged his real estate with the payment of his debts.

Mr. Shadwell, for the creditors.

The introductory words shew that it was the intention of the testator to create a charge for the payment of his debts, beyond the mere liability which the law would of itself create ; and the direction that his debts should be

Where a testator directs his just debts and funeral expenses to be fully paid and satisfied by his executor thereafter named, it is a condition imposed upon the executor to satisfy the testator's debts and funeral expenses, as far as all the property, which he derives under the testamentary disposition, will extend, whether real or personal.

1827.

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v.
WHITAKER.

paid will be entirely inoperative, if the personalty alone be applicable to that purpose. He has devised real estates to his executor; and he has ordered the executor to pay all his debts: must not that direction be considered as annexing a condition to the devise, or as creating a charge on the property so devised? The legacies are charged on the real estate; whence a fair presumption arises, that the testator considered his real and personal estate as forming one fund for the purpose of his will. Looking at the language which the testator has used, it is not probable that he should have intended to shew greater favor to his legatees than to his creditors.

Mr. Sugden and Mr. Roupell, for the devisee.

The first direction of the testator is, that his debts should be paid by his executor; and as the character of executor has reference only to the personalty, no inference can thence be drawn that the intention was to charge the real estates. He then charges his real estate with his legacies, and devises it to the same person whom he afterwards appoints his executor. But if the preceding part of the will did not charge the lands with debts, no intention as to that point can be collected from the subsequent charge of legacies. The devise to *William Whitaker* is to him by name, and not as executor.

The following cases were cited: *Williams v. Chitty* (a), *Godolphin v. Penneck* (b), *Trott v. Vernon* (c), *Stanger v. Tryon* (d), *Kay v. Townsend* (d), *Davis v. Gardner* (e), *Noel v. Weston* (g), *Coombes v. Gibson* (h), *Powell v. Robins*. (i) The cases of *Finch v. Hattersley*, and *Bridges v. Landen*, referred to, the former in 3 *Ves.* 550., and the latter

(a) 3 *Ves.* 545.

(b) 2 *Ves.* 271.

(c) *Prec. Chan.* 430. and
2 *Vern.* 708.

(d) 2 *Vern.* 709. n.

(e) 2 *P. Wms.* 188.

(g) 2 *V. & B.* 269.

(h) 1 *Bro. C. C.* 275.

(i) 7 *Ves.* 209.

in 7 Ves. 210., were also relied on as authorities, in favor of, and the other against, the claim of creditors.

1827.
HENVELL
v.
WHITAKER.

MASTER of the ROLLS directed the cause to stand in order that the facts of these two cases might be ascertained by an examination of the reporter's book.

The

* FINCH v. HATTERSLEY.

Finch v. Hattersley, upon examination of the Reporter's book, appeared to be of the following effect:—

Defendant, *James Hattersley*, made his will, where-
in, directed, "that all his
estate of the value of 20s. in
land, and his funeral
expenses should be paid by
his executrix thereafter

and he gave to his
said *Hattersley*, all and
his houses, lands,
messuages, and tenements
wherever, with their appur-
tenances, situate in the town-
ship of *Barnsley*, in the
county of *York*, or in the
parishes or precincts thereof.
He gave to his wife all the
his goods and chattels
his personal estate whatso-
ever, which said houses, mes-
suages, lands, and tenements,
chattels, and personal
estate he willed should be
assessed and enjoyed

by his said wife for and
during her life; and, at the
end thereof, he willed that
they should be divided by
his said wife among such of
his children as should be then
living, in such proportions as
she should think proper: and
he thereby constituted her,
his said wife, executrix of his
said will.

By the decree, the Master
of the Rolls declared, that,
in case the said testator's
personal estate should not be
sufficient for payment of his
debts and funeral expenses,
the deficiency ought to be
made good out of the said tes-
tator's real estates, and did
decree, that such deficiency
be raised by sale or mortgage
of the said testator's real
estates, or a sufficient part
thereof.

Reg. Lib. 1775. A. 223.

BRIDGEN

1827.

HENVELL
v.
WHITAKER.

May 31.

The case was re-argued, and the following additional authorities were cited: *Harris v. Ingledew* (a), *Lee v. Warrington* (b), *Cloudsly v. Pelham* (c), and *Keeling v. Brown*. (d)

The

(a) 3 P. Wms. 92.

(c) 1 Vern. 411.

(b) 4 Bro. P. C. 90.

(d) 5 Ves. 359.

BRIDGEN v. LANDER.

The case referred to under the name of *Bridges v. Lander*, appears in the Registrar's book under the name of *Bridgen v. Lander*.

There the question arose upon the will of *Garrard Lander*, which was to the following effect: — “ *Imprimis*, I will that all such debts as I shall justly owe at the time of my decease, and my funeral charges and expenses be in the first place paid by my executrix hereinafter named, and as to my real and personal estate, I dispose thereof in the manner following: that is to say, first, I give, devise, and bequeath unto my wife, *Elizabeth Lander*, for and during the time of her natural life, one annuity or yearly rent-charge of 6*l.* a year, &c. over and above the yearly interest of the sum of 200*l.* settled on her the said *Elizabeth Lander* on her marriage with me *Garrard Lander*, which said annuity

or yearly sum of 6*l.* a year I do order and direct to be paid half-yearly, the first payment to be made, &c.: and I do hereby charge and make liable all my real estate to and with the payment thereof. And I hereby also give, devise, and bequeath unto my wife, *Elizabeth Lander*, for and during the term of her natural life, one half of all my stock of cattle, corn, hay, implements of husbandry, and household goods, to hold to her, &c. during the term of her natural life, and from and after her decease or marriage again, then I give and devise the same to my son, *John Lander*, and his heirs for ever; but in case my said wife, *Elizabeth Lander*, should marry again, then and in such case I give my same wife for her own use for ever, such part of my household goods as she shall accept, to the value of 200*l.*, to be appraised,”

MASTER of the ROLLS.

en the testator in his will directs that all his just
and funeral expenses be fully paid by his executor
there-

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HENVELL

v.

WHITAKER.

" &c. He then gave
his three daughters
of 150*l.* a piece,
charged on his real
estate. "*Item,*
give, devise, and be-
unto my son, *John*
, his heirs and assigns
r, all my messuages,
and also all other my
d personal estate of
ature or kind soever,
hold unto my son,
ander, his heirs and as-
subject to and charged
urgeable with the said
of 6*l.* a year to my
fe as aforesaid, and
sum of 150*l.* a piece
of my said daughters
said; and I do here-
stitute, nominate, and
my wife, *Elizabeth*
, sole executrix of this
will and testament."

bill was filed by cre-

decree made at the
hearing on the 27th
ary 1785, was, "that
was well proved, and
to be established; that
referred to the Master
an account of the
and funeral expenses,
the testator; that an

account be also taken of the
personal estate of the tes-
tator come into the hands of
the executrix, and that the
testator's personal estate be
applied in payment of his
debts and funeral expenses
in a course of administration;
and in case the said testator's
personal estate will not be
sufficient to pay all debts,
His Lordship doth reserve
the consideration of all fur-
ther directions," &c.

Reg. Lib. 1785. A. 160.

By the decree on further
directions, made on the 31st
of *October* 1787, His Lord-
ship did declare, "that what
remains due to the specialty
creditors of the testator, and
also what is due to the simple-
contract creditors, to the
extent of so much of the
personal estate as has been
exhausted in payment of the
debts due to the creditors by
specialty, (in whose place the
simple-contract creditors are
to stand and to receive a
satisfaction *pro tanto*,) is to
be raised by sale of the said
testator's real estate, or a
sufficient part thereof."

Reg. Lib. 1787. A. 686.

1827.

HENVELL
v.
WHITAKER.

thereinafter named, it must be intended, that he had then fully determined who that executor should be; and the will is to be construed as if he had said, "I direct that my just debts and funeral expenses be fully paid and satisfied by my nephew *William Whitaker*, whom I hereinafter name my executor." In such case the obligation to pay his debts and funeral expenses would be a condition imposed upon the nephew *William Whitaker*, to be satisfied as far as all the property, which he derived under the will, would extend, whether personal or real. This principle will reconcile all the authorities, and will be of ready application in future cases.

I must declare, therefore, as in *Finch v. Hattersley*, that the deficiency of the personal estate for the payment of debts and funeral expenses is in this case to be made good out of the testator's real estate.

1827.

LANDON v. FERGUSON.

ROLLS.
May 15.

THIS was a creditor's suit. It appeared on the Master's report that the testator, at the time of his death, was indebted on judgments and bonds, as well as by simple contracts. At the hearing on further directions, it was stated, that it did not appear that all the judgments had been docketed according to the 4 & 5 W. & M. c. 20. s. 3.; and it was insisted, that debts due on undocketed judgments had no priority, in the administration of assets, before simple-contract debts.

Judgments not docketed have no preference against heirs, executors or administrators.

Lord GIFFORD, MASTER *of the ROLLS*, referred it back to the Master to inquire, whether any and which of the judgments had been duly docketed.

The Master reported that some of the judgments had been duly docketed, and that the rolls of two other judgments had been carried into the proper office for the purpose of being docketed, but that, from some mistake of the officer, the dockets had not been completed.

The cause having come on for further directions, the question was, Whether judgments not docketed had any preference to other debts against heirs, executors, or administrators? The cases of *Hickey v. Hayter, Administratrix* (a), and *Steele v. Rorke, Administrator* (b), were cited.

The

(a) 6 T. R. 384.

(b) 1 Bos. & Pul. 507.

1827.

LONDON

v.

FERGUSON.

The MASTER of the ROLLS held clearly, that judgments not docketed had no preference.

Mr. Horne and *Mr. Ching*, for the Plaintiffs.

Mr. Shadwell and *Mr. Theobald*, for the Defendants.

Mr. Sugden for the creditors, whose judgments had not been docketed.

ROLLS.

May 21.

ABRAMS v. WINSHUP.

A devise of lands to *A.* "for paying his son 50*l.* when of the age of twenty-one years," gives *A.* the fee beneficially, charged with the payment of 50*l.*

THE will of *Lionel Winshup* contained, among other devises, the following: — "I bequeath unto *Joseph Bulmer*, senior, all the front of the street on the west side of the yard as far as the stone stairs, for paying his son *Thomas Bulmer*, my nephew, 50*l.* when of the age of twenty-one years."

Mr. Sugden argued, that these words did not give any beneficial interest to *Joseph Bulmer*, senior. A mere devise to *A.* for paying *B.* 50*l.* has never been held to do more than to create a charge for the particular purpose expressed; though the construction might have been different, had the devise to *A.* been accompanied with any words expressive of attachment or regard towards him, or shewing that *A.* was an object of bounty to the testator. Here the devise is, in substance, a devise to *A.* on trust to sell and to pay *B.* 50*l.*

The MASTER of the ROLLS was of opinion, that this was a devise of the fee of the premises to *Joseph Bulmer*, senior, charged with the payment of 50*l.* to his son.

1827.

BOLLAND v. DISNEY.

May 21.

BY a policy of assurance, which, on the 11th of *January* 1815, *Henry Fauntleroy* effected on his life, with the Amicable Society, it was witnessed, that he, *Fauntleroy*, was admitted a member of that society; and the corporation bound themselves and their successors to pay to his executors, administrators, or assigns, such a proportion of the joint stock or fund, as on his death should become due according to the society's charter and bye-laws. In *October* 1824, *Fauntleroy* was declared a bankrupt; shortly afterwards he was convicted of forgery, and, on the 30th of *November*, he was executed, pursuant to his sentence. The premiums had been duly paid up to the time of his death.

In the policies effected by the Amicable Society, there is no exception as to death by the hands of justice: a person, insuring his life in that office, afterwards suffered death for a criminal offence: the policy was not thereby avoided.

The sixth bye-law was in the following words:—
 “That every policy hereafter to be issued (other than in exchange of policies heretofore issued, or in lieu of such policies, in case of their being lost,) shall contain a condition to be, and shall be, null and void, in case the declaration required by the fifth bye-law shall in any respect be untrue or fraudulent, or in case the person admitted a member on his or her own life, or the person on whose life the contribution is made, shall go out of *Europe*, or engage or be employed in military service out of the United Kingdom, or in naval or maritime service or occupation, without first obtaining license in writing from the court of directors, and paying such further or additional premium as shall be required by them.” These were the only cases in which it was expressly provided, that the policies should be void.

The

1827.

BOLLAND
v.
DISNEY.

The bill was filed by the assignees of *Fauntleroy*, praying that an assignment of the policy, which had been made in 1819, might be declared to be void, and that the Amicable Society might be decreed to pay to the Plaintiffs what was due on the insurance.

The only question argued was between the Plaintiffs and the Amicable Society, who contended that, because *Fauntleroy* had perished by the hands of justice, no person could make any claim against them under the policy of insurance.

Mr. Sugden, Mr. Pepys, and Mr. Koe, for the Plaintiffs.

Mr. Shadwell, Mr. Rose, and Mr. Skirrow, for the Amicable Society.

I. The contract between the assured and the assurer is, that, if the former dies within a given time, the latter shall pay to his representatives a certain sum of money. The purpose is to provide, so far as pecuniary arrangements are concerned, a species of indemnity against the chance of death, as depending on the course of nature and the accidents of life; but it is not the purpose of the contract to indemnify the assured against his own act; and if he by his personal agency terminates his existence, he cannot make the society liable. A man must be presumed to know the natural and legal consequences of his own conduct. If he perpetrates a crime which the laws of his country punish with death, he must be held to have acted with foresight of the fate which he thus prepares for himself; and his death is as much his own act, as if he had committed suicide. He, therefore, cannot make it the foundation of a pecuniary claim, under a contract of insurance on his life, any
more

more than he could under an insurance against fire, if he had himself caused the destruction of the insured premises; or under an assurance against the perils of the sea, if he had wilfully brought about the loss of the vessel.

1827.

BOLLAND
v.
DISNEY.

Secondly, in this society the assurer and the person insured, being, as such, members of a co-partnership, are bound by an implied faith arising out of the partnership relation. A partner is not at liberty to do an act which shall withdraw funds from the partnership, and convert them into part of his own assets; he cannot be allowed, by his own conduct, and still less by the perpetration of a crime, to acquire a pecuniary benefit at the expense of his partners.

Thirdly, at all events, the question is one of a nature purely legal; and though the mode, in which the policy has been dealt with, has enabled the Plaintiffs to bring the point for adjudication into a court of equity, a decision ought not to be pronounced against the society, without giving them an opportunity of obtaining the opinion of a common law tribunal.

The MASTER of the ROLLS.

Where the policy does not provide that the obligation to pay shall determine, if the event insured against shall happen in a certain specified manner, then, if the event do happen in that manner, the obligation to pay shall not determine, merely because the conduct of the party insured produced the event, even though such conduct was an offence against the criminal law of the country. To avoid the obligation to pay, the act of the party insured, which produced the event, must be done fraudulently, for the very purpose of producing the event.

1827.

BOLLAND
v.
DISNEY.

Decree for the Plaintiff, but without costs, on account of the conflicting claims between the Plaintiffs and the Defendants Mr. and Mrs. *Disney*.

May 22.

FARMER v. BRADFORD.

Where, under a settlement, a testator had, in a certain event, the fee of an estate, subject to a term, and had, under the same settlement, a power, in the particular event, to appoint the fee, subject to the term, by deed or will, and by his will he devised the estate in fee, without reference to his power, the will takes effect as a devise of his interest, and not as an execution of his power.

By the same settlement he had, in the events which happened, a power to appoint a sum of 1000*l.*, which

was to be raised after his death by the term to which the fee of the same estate was subject; but his will took no notice whatever of this power: the devise of the estate does not operate as an execution of the power to appoint the 1000*l.*

BY an indenture of settlement, dated the 9th of May 1801, and made previous to the marriage of *William Farmer* with *Sarah Peck*, her uncle, *William Peck*, conveyed an estate called *Lushill* to two trustees, their heirs and assigns, to the use of him, *William Peck*, and his heirs and assigns, till the intended marriage; and from and after the solemnization thereof, to the use of the said *William Peck* and his assigns, during the term of his natural life; and from and immediately after his decease, to the use of the Defendant *James Bradford*, for a term of 500 years, to commence from the death of *William Peck*; and from the end or sooner determination of that term, to the use of such person or persons, and for such estates and interests, as the said *William Peck* should, by deed executed and attested in the presence of two witnesses, or by will executed in the presence of and attested by three witnesses, limit and appoint; and, in default of appointment, then to the use of the said *William Peck*, his heirs and assigns for ever. And as to the term of 500 years, it was thereby declared, that the Defendant *James Bradford*, his executors and administrators, should, after the decease of *William Peck*, out of the rents and

its of the said hereditaments, or by mortgage or
 eof for all or any part of the said term of 500
 ise and levy the sum of 1000*l.*, with interest for
 at the rate of 5 per cent. from the decease of
Peck, and should stand and be possessed thereof
 st to permit *William Farmer* to receive the clear
 terest and proceeds thereof during the term of his
 ife; and, after his decease, to permit and suffer
Sarah Peck, his intended wife, to receive the
 arly interest and proceeds thereof during the
 er natural life; and from and after the decease of
 vor of *William Farmer* and his said wife, to pay
 of 1000*l.*, and the interest and proceeds thereof,
 amongst all and every the child or children of
 e said *William Farmer* and his intended wife,
 issue of such of their children as should be then
 manner therein mentioned; and if there should
 ch child, nor any issue of such child, living at
 h of the survivor of *William Farmer* and his
 nded wife, then to pay the said sum of 1000*l.*,
 interest and proceeds thereof, unto such persons
 uch manner as the said *William Peck* should
 by any deed executed as therein mentioned, or
 ill executed in the presence of and attested by
 nesses; and in default of such appointment, then
 st to pay the same to the executors and ad-
 ors of *Sarah Peck*, the intended wife.

1827.
 FARMER
 v.
 BRADFORD

marriage took effect. In 1803, *Sarah Peck*,
 died, leaving only one child, who died within
 eeks afterwards, and in the lifetime both of the
William Farmer, and of *William Peck*, the mother's

21, *William Peck* made his will, and thereby,
 mentioning the powers of appointment reserved

1827.

FARMER
v.
BRADFORD.

to him by the indenture of the 4th of *May* 1801, or using any words of reference to those powers or to the settlement, devised his manors, lands, hereditaments, and premises at *Lushill*, and all other his real estate, to his nephew *William Peck*, his heirs and assigns for ever: and, after giving certain pecuniary legacies, he bequeathed all the residue of his personal estate and property whatsoever unto his said nephew, for his own absolute use and benefit, and appointed him sole executor of his will. He died not long afterwards.

The 1000*l.* not having been raised, *William Farmer*, who had taken out administration to his deceased wife, filed his bill against the trustee, *James Bradford*, and the devisee, *William Peck*, the nephew, praying to have the 1000*l.* raised from the *Lushill* estate, and that it might be declared, that, in the events which had happened, the Plaintiff, in his own right in respect of his life estate, and as the administrator of his deceased wife, was absolutely entitled to the money.

The Defendant *Peck* claimed the 1000*l.*, subject to the Plaintiff's life interest, on the ground, that the devise of the estate to him would pass all such interest in a sum of money charged on that estate, as the deviser had power to appoint.

Mr. Sugden and *Mr. Wilbraham*, for the Plaintiff.

By the settlement of 1801, the 1000*l.* was completely severed from the inheritance: it was the duty of the trustees to have raised the money, and, in their hands, it would have been subject, in consequence of the death of the wife and the failure of issue of the marriage in the husband's lifetime, to a trust for the husband for life; remainder to such persons as *William Peck* should appoint; remainder to the administrators of the wife.

There-

Therefore, *William Peck* had no interest in the sum; he had only a power of appointment.

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The devise of the estate cannot be considered as an appointment: first, because the will, not referring to the power, and the words of it being fully satisfied by property other than that which is the subject of the power, is not an exercise of that power; secondly, because a devise of the fee, which was in the testator, cannot operate upon a sum of money, charged upon the estate, over which the testator had a power of appointment, but in which he had no interest. Therefore, as the power has not been exercised, the limitation in default of appointment must take effect.

Mr. Preston and *Mr. Bickersteth*, for *William Peck*.

The Plaintiff has no equity to claim this principal sum against the inheritance. The power, which *William Peck* reserved over the inheritance, corresponds and is almost in the same terms with the power over the charge; which shows the intention of the parties, that his control over the inheritance and over the charge should be, as it were, consolidated. If *William Peck* had sold the *Lushill* estate to a purchaser for a valuable consideration, would not his conveyance have operated as an appointment of the 1000*l.* to the purchaser? The money could not be raised till after his death; and, in disposing of the estate itself, he must be considered as disposing inclusively of the reversionary charge to which it was subject, as far as his power of disposition extended to that charge. Therefore the devise to him of the *Lushill* estate passed the interest of the 1000*l.*, which the testator had power to appoint. A power to appoint money to be raised out of an estate, may be exercised by an appointment of the estate itself. *Bullock v. Fladgate*(a),
Pearson

(a) 1 *Ves. & B.* 471.

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Pearson v. Lane. (a) “It has been held,” says Sir W. Grant in the former case (b), “that a power to appoint an estate in land, includes a power to dispose of the estate and appoint the produce: the same effect has been given in the more doubtful case of a power to charge an estate; and a power to appoint the money produced by an estate directed to be sold, has been considered as a power to appoint the estate itself.”

Mr. *Preston* cited also a manuscript case of *Beaumont v. Twiss*, decided in 1777, in which it was said to have been held, that the devise of an estate passes a charge upon it, where the testator has no other interest than a power to charge.

Mr. *Rose*, for the trustee.

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The testator here has, by the settlement, a power to appoint the remainder in fee of the *Lushill* estate, subject to his own life-interest and to a term of 500 years; he has by the same settlement, an interest in the whole fee of the estate, subject to the term of 500 years; and by the same settlement, he has also a power to appoint a sum of 1000*l.* to be raised by the 500 years' term, in the event of there being no child, nor issue of any child of the Plaintiff and *Sarah Peck*, living at the death of the survivor. By his will, which contains no reference either to the settlement or to his power, he devises his *Lushill* estate in fee to the Defendant, his nephew, and constitutes him residuary legatee of his personal estate. According to the settled rule of construction, the devise of the *Lushill* estate must take effect out of his interest, and not in execution of his power; and is, therefore, a
 devise

(a) 17 *Ves.* 101.

(b) 1 *Ves. & B.* 478.

devise of the *Lushill* estate in fee to his nephew, subject to the 500 years' term; and, consequently, to the trust of that term. There being no manner of reference to the settlement, nor to the power of the testator to appoint, after the death of the Plaintiff, the 1000*l.* which is to be raised by the trust of that term, the will cannot operate directly as an appointment.

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 v.
 BRADFORD.

But it is said, it operates indirectly as an appointment — that the devise of the *Lushill* estate, is, in effect, an appointment of all interest in the *Lushill* estate which the testator had the power to appoint. The two cases of *Pearson v. Lane* and *Bullock v. Fladgate*, which have been cited for the Defendant, the nephew, do not appear to me to bear upon such point; nor does the manuscript case of *Beaumont v. Twiss*, if correctly stated. Where a testator has no other interest in an estate than a power to charge, it may well be intended, that, by the devise of the estate, he meant to execute his power to charge; or the devise would be wholly inoperative. But here the devise will pass the fee of the estate, subject to the 500 years' term; and every word of the will may operate fully, without conjecturing that the testator meant what he has not expressed or intimated.

Declare, therefore, that, the testator having made no appointment of the 1000*l.*, the Plaintiff, in his own right, and as administrator of his wife, is absolutely entitled to it.

1827.

May 22.

DA COSTA v. KEIR.

The words, if "A. B. shall happen to die, leaving a child or children," construed to mean, upon the effect of the whole will, the death of A. B. before the testator's widow.


A testator gave the residue of his estate upon trust, to pay the interest to his widow during her life for her separate use, and, after her decease, to pay the principal to C. for her own use, and to be at her own disposal; but if C. should happen to die, leaving any child living at her decease, then to such child or children; and if she should happen to die, without any child living at

THE testator, *Benjamin Da Costa*, by his will, disposed of his residuary estate, which consisted entirely of personal effects, in the following words:—

"*Item*, all the rest, residue, and remainder of my estate, whatsoever and wheresoever the same now is or shall be at the time of my decease, or of whatsoever the same shall then consist, I give, devise, and bequeath unto the said *Charles Broughton*, *Joseph Da Costa*, and *Joseph Wessell*, and to the survivor and survivors of them, and to the executors and administrators of such survivor, upon this special trust and confidence nevertheless; upon trust that my said trustees shall pay the interest and dividends arising therefrom from time to time, as the same shall become due and payable, unto my said dear wife *Mary Da Costa*, for and during the term of her natural life, no ways subject or liable to any debts, control, or engagements of any husband she may futurely marry, but that her receipt alone shall from time to time be a sufficient discharge, notwithstanding her coverture, to any trustees for the same; and from and after her decease, then I give the principal of the residue of my said estate unto *Catharine Da Costa*, to and for her own use and benefit, to be at her own disposal; but if the said *Catharine Da Costa* should happen to die, leaving any child or children living at her decease, then

her decease, then to D. and E.; but if either of them should die, before they should become entitled to receive the fund, then he gave the whole to the survivor; and if they should both die in the lifetime of his widow, then he gave the whole to his wife absolutely: C., having survived the widow, was entitled to the residue absolutely.

an I give the residue of my said estate unto such children, equally to be divided amongst them, share and share alike; and if but one child, to such only child; but if the said *Catharine Da Costa* should happen to die without any child or children living at the time of her decease, then I give the same unto the said *Joseph Da Costa* and my sister *Jane Twycross*, equally to be divided between them, share and share alike; but if either of them should happen to die before they shall come entitled to receive the residue of my estate, then I give the whole thereof unto the survivor; but if they both should happen to die in the lifetime of my said dear wife *Mary Da Costa*, then I give the same unto my said dear wife *Mary Da Costa*, for her sole and separate use and benefit, and to be at her own disposal."

1827.

Da Costa
 or
Mina

The testator died; and then, *Joseph Da Costa*. The widow, died next; and she left *Catharine Da Costa* and *Jane Twycross* her surviving.

The bill was filed by *Catharine Da Costa*, praying a declaration, that, as she had survived the widow she was absolutely entitled to the testator's residuary estate.

Jane Twycross insisted, by her answer, that, according to the true construction of the will, the Plaintiff took only a life interest in the residue; that, the words of bequest, importing an absolute gift to her, were controlled by the subsequent clauses; that the intention of the testator, to be collected from the whole will, was, that, after the death of the widow, the Plaintiff should have the interest of the fund during her life, and that, after her decease, the principal should go to her children, if she left any, but, in case she did not leave a child, to *Joseph Da Costa* and *Jane Twycross*, and the survivor of them; and, therefore, as *Joseph Da Costa* had died in

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 }
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in the lifetime of the widow, that she, *Jane Twycross*, was entitled to the fund absolutely, subject to the life interest of the Plaintiff, and the contingency of her leaving a child.

The question in the cause was, whether, in the events which had happened, *Catharine Da Costa* did take absolutely, or took for life only, with remainder over, in case she had no child living at her decease, to the testator's sister, *Jane Twycross*.

Mr. Sugden, for the Plaintiff.

When the testator says, "if the said *Catharine Da Costa* should happen to die, leaving any child or children living at her decease," and "if the said *Catharine Da Costa* should happen to die without any child or children living at the time of her decease," and when he provides for these events, he must have meant the death of *Catharine Da Costa* in the lifetime of the widow, who was tenant for life of the fund. In the immediately preceding clause he gives the principal to *Catharine* for her own use, and to be at her own disposal: that is an express absolute gift; and if the subsequent clauses are to reduce her in every possible event to merely a life interest, the will becomes inconsistent. There must be some possible event, in which she may take absolutely; and the event, in which she is to take absolutely, is that of her surviving the widow. The subsequent gifts to her and her children are substitutions for the interest thus given to her, which are to take effect, only if she dies before the tenant for life. *Doe v. Sparrow* (a), *Clayton v. Low* (b), *Slade v. Milner*. (c) The principle of construction contended for by the Plaintiff, is the same as was adopted in

(a) 13 *East*, 559.

(b) 5 *B. & A.* 636.

(c) 4 *Madd.* 144.

in these cases, though the event be different to which the general expression of "dying" is here referred. In these cases "dying" was held to mean dying in the lifetime of the testator; here it means dying in the lifetime of the tenant for life of the fund.

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 KEIR.

Mr. *Bellamy*, for *Jane Twycross*.

The MASTER of the ROLLS.

From and after the decease of his widow, the testator gives the principal of the residue of his estate unto the Plaintiff, to and for her own use and benefit, and to be at her own disposal: but if she happens to die, leaving a child or children, then, after her decease, *Joseph Da Costa* and *Jane Twycross* are to take. There is, therefore, according to the form of these expressions, first, a general gift to her absolutely; and, next, a qualification of, or exception to, that gift, in particular events only. But, according to the construction contended for by the Defendants, the latter expressions, although in the form of qualification or exception in particular events, amount to a simple revocation of the prior general gift: for as *Catharine Da Costa*, when she dies, must die either leaving a child or not leaving a child; and as, in either case, the Defendant, *Jane Twycross*, says, that she is to be entitled; it necessarily follows, that in no event can this residuary estate be at *Catharine's* own disposal, according to the plain expressed intention of the testator.

Upon examining, however, the subsequent part of the will, it manifestly appears that the testator did mean qualification and exception, as the form of the latter expressions imports; and it also appears what that qualification and exception was. He proceeds to say, that, if either *Joseph Da Costa* or *Jane Twycross* should

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Kear

should die before they become entitled to his residuary estate, then the whole is to go to the survivor of the two: but if both should die in the lifetime of his wife, *Mary Da Costa*, then his wife is to take the whole residuary estate absolutely. It is plain, therefore, that the death of his wife is the period at which he meant that *Joseph Da Costa* and *Jane Twycross*, or either of them, if then living, should become entitled to his residuary estate: and as they were not to take while the Plaintiff, *Catharine Da Costa*, lived, the unavoidable conclusion is, that the dying of *Catharine Da Costa*, which the testator contemplated, was a dying in the lifetime of his wife. By this construction, the whole will is made consistent.

Declare, therefore, that the Plaintiff, *Catharine Da Costa*, in the event which has happened, is absolutely entitled to the testator's residuary estate.

1827.

SMART v. CLARK.

May 31.
June 1.

THE will of the testator as to the point in question, was in the following words: — “ I give to my son, *Edward Clark*, who is now at sea, the interest of 500*l.* stock in the 5 per cents. navy, during his natural life, if he comes to claim the same within five years after my decease; but if he should die or not come to claim the same within the time limited, then I give the said stock to the children of my daughter *Ann Smart*, share and share alike, with all the interest that may be due thereon.” The residue of his estate he bequeathed to his four daughters.

In order to advance the apparent intention of the testator, the words, “ if he should die,” were construed, “ when he should die.”

The son, *Edward Clark*, having returned to this country and claimed the bequest within the five years, received the dividends of the stock during his life, and died after the five years had elapsed. Upon his death, the children of *Ann Smart* filed their bill to have the 500*l.* stock transferred to them; and the question in the suit was, whether the 500*l.* stock, bequeathed to *Edward Clark* during his life, went over, upon his death, to the children of *Ann Smart*, or became part of the testator’s residuary estate.

Mr. *J. Russell*, for the Plaintiffs.

The testator has completely severed this sum of stock from the residue of his estate, and has appropriated it for the benefit of *Edward Clark* during his life, and afterwards to the children of *Ann Smart* absolutely. If it had been given to *Edward Clark* absolutely, the gift to the children of *Ann Smart* might, perhaps, have been regarded

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regarded as merely a substitution for the former gift; and it might have been held, that the bequest to them could never come into operation, if the former gift took effect. But as *Edward Clark* has only a life interest given to him, and as the gift to the children of *Ann Smart* is absolute, the latter cannot be regarded as a substitution for the former, but is a limitation under which the children will take, either if *Edward's* life interest never arises, or when it expires by his death. The children of *Ann Smart* were postponed merely for the sake of giving the dividends to *Edward* during his life; and no reason can be assigned, why the testator should have intended that the stock should go to them, if *Edward* died either in the testator's lifetime, or within five years afterwards, and that it should not go to them, if *Edward* survived him by six years. It is true that, *primâ facie*, the conjunction "if" imports contingency; but the testator was naturally drawn into the use of an expression importing contingency, because one event, for which he was providing, — namely, that of *Edward* not claiming the legacy within five years, — was contingent. There are many cases, in which "if *A. B.* shall die" has been held to mean "when *A. B.* shall die." In *Fortescue v. Abbott* (a), "if either of the testator's children should depart this life," was construed "when either of his children should die." "In case," is a phrase importing contingency, at least as strongly as "if;" yet in *Billings v. Sandom* (b), where a testator gave 1000*l.* to *A.*, and in case of *A.*'s decease, to *B.* and *C.*, Lord *Thurlow* held that the money was given to *A.* for life only, with remainder to *B.* and *C.* A similar conclusion was adopted in *Nowlan v. Nelligan* (c), and in *Douglas v. Chalmer* (d). If words, which *primâ facie* import con-

tingency,

(a) *Pollexfen*, 479. *Fearne on Contingent Remainders*, 243.
(b) 1 *Bro. C. C.* 394.

(c) *Ibid.* 489.
(d) 2 *Ves. jun.* 501.

ingency, may be considered as denoting generally the death of the person to whom they are applied, even when the interest of that person in the fund is not confined expressly to his own life; much more easily may they receive that construction, when it is declared by unequivocal words, that the person, whose death is spoken of, is to take for his life only.

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CLARK.

Mr. Wilbraham, for the residuary legatees.

The 500*l.* stock is given to the children of *Ann Smart*, only in case certain contingent events should happen. One of the contingencies was, if *Edward Clark* did not claim the legacy within five years; and that event did not happen, for he did claim the legacy before five years had elapsed. The other contingency was, "if he should die:" these words in themselves import contingency: death at some time or other is not contingent; but death within a given time is contingent; and the testator, therefore, must have meant death within a given time, namely, within the five years. The words, "within the time limited," modify the whole of the preceding clause; and apply to the first branch of it, "if he should die," as well as to the latter branch, "or not come to claim the same." Even if there had not been a time expressed in the will, to which the contingency might be referred, the Court, to satisfy the natural meaning of the words, would have referred the dying to death in the testator's lifetime. *Beckford v. Tobin* (a), *Hill v. Hill* (b), *Slade v. Milner* (c), *Hinckley v. Simmons* (d) *King v. Taylor* (e), *Turner v. Moor* (g), *Galland v. Leonard* (h), *Cambridge v. Rous* (i).

The

(a) 1 *Ves. Sen.* 308.

(b) 3 *Ves. & B.* 185.

(c) 4 *Madd.* 144.

(d) 4 *Ves.* 160.

(e) 5 *Ves.* 806.

(g) 6 *Ves.* 557.

(h) 1 *Swanst.* 161.

(i) 8 *Ves. jun.* 12.

1827.

SMART

v.
CLARK.*The MASTER of the ROLLS.*

I fear it is difficult to reconcile all the cases which have been cited. The case of *Billings v. Sandom* is, however, an authority directly in point; there being no difference in the sense of the expressions "if he should die," or "in case he should die:" and I more readily follow that case, because it can hardly be doubted, that the real intention of the testator was, that the children of his daughter should be the objects of his bounty, the son being out of the way.

1827.

In re SILCOCK'S Estate.

ROLLS.

May 29.

In this case the question was, whether, where a feme covert was tenant in tail in remainder, after a subsisting estate, of money to be laid out in land, she, by an arrangement with the tenant for life, and by order of the Court made upon her private examination under the 7 G. 4. c. 45., being the act amending the act commonly called Lord *Eldon's* act, entitle her to immediately to receive a proportion of the money.

A feme covert, tenant in tail in remainder of money to be laid out in land, by arrangement with the tenant for life, and on a private examination, under the 7 G. 4. c. 45., consented to the payment of a proportion of the money to her husband; and the order was made accordingly.

The MASTER of the ROLLS, upon a precedent before *Gifford*, and upon reference to the act, made the order for payment to the husband.

BROOKER v. COLLIER.

May 22.

The decree ordered certain premises to be sold. The Plaintiff, who was a party interested in the proceeds of the sale, was desirous that there should be a reserved bidding, and he asked, at the hearing, that a direction to that effect might be inserted in the decree.

A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to be the subject of a separate order.

The MASTER of the ROLLS stated, that such a direction ought not to be inserted in the decree, but must be the subject of a separate order.

1827.

May 21.
July 19.

MORTIMER v. WEST.

A testator devised his real and personal property to trustees, upon trust for four children of *Martha Davies*, whom he described by their respective names, "together with every other child born of the body of *Martha Davies* alive at my decease, or born within nine months afterwards, share and share alike:" *Martha Davies* had two other children born after the date of the will, but before the date of a codicil to it; and these, as well as the four previously born, were all illegitimate: The children, born after the date of the will, are not entitled to any share of the property.

RICHARD MORTIMER, by his will, dated in *February* 1802, and duly executed and attested, gave all his real and personal estate to trustees, upon trust, among other things, to pay an annuity of 150*l.* a year to his wife, and another annuity of 100*l.* a year, to a woman of the name of *Martha Davis*, "and upon further trust," continued the testator, "as to the residue or net proceeds of the said rents, profits, interest, and other monies (after discharging all necessary outgoings), and as to the whole of the same rents and profits and monies, after the several deceases of my said wife *Mary*, and *Martha Davies*, to pay and divide the same by quarterly payments, to and amongst *Ann*, the daughter of the said *Martha Davies*, born on or about the 13th *January* 1795, and baptized &c. by the name and description of *Ann*, the daughter of *Richard* and *Martha Davies*; *Richard*, born on or about the 21st *June* 1796, and baptized &c. by the name and description of *Richard*, the son of *Richard* and *Martha Mortimer*; *John Treasure*, son of the said *Martha Davies*, born on or about the 14th *October* 1799, and baptized &c. by the name and description of *John Treasure*, son of *Richard* and *Martha Mortimer*; *James*, son of the said *Martha Davies*, born on or about the 16th *June* 1801, and baptized &c. by the name and description of *James*, the son of *Richard* and *Martha Mortimer*; or such of them as shall be living at my decease, together with every other child born of the body of the said *Martha Davies*, and living at my decease, or born and living within nine calendar months afterwards, share and share alike, for their several lives: and, from and after the decease of every of the said children of the said *Martha Davies*,"

ries," the testator disposed of his property in favour of their issue.

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v.
WEST.

The testator's wife died in his lifetime.

In March 1804, he made a codicil to his will, in which, after revoking the bequest of the annuity of £. per annum to *Martha Davies*, he added, "And in lieu thereof, in case she is living with me at my decease, and not otherwise, I give and bequeath to her a sum of 100£. only; and I do hereby revoke such part of my will on account of the ill treatment of the said *Martha Davies* to me, which has been the sole ground of my not marrying her; and I do declare this to be taken as a full revocation of such within bequest, which is now to sink into the residue of the estate for the benefit of the children interested."

By a second codicil, dated in June 1807, he revoked the bequest to *Martha Davies*.

Neither of the codicils was attested so as to pass freehold lands.

The testator died in March 1809, leaving a considerable property, including both freeholds and leaseholds.

Of the four children of *Martha Davies*, named in the will, one died in the testator's lifetime. *Martha Davies* had two other children born subsequently to the date of the will, but both of them before the date of the last codicil: *Thomas*, born in January 1803, and *Jeremiah*, born in June 1805. All these children were illegitimate.

The question was, whether *Thomas* and *Jeremiah* took any interest in the property under the words of the will.

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WEST.

The cause had been argued before Lord *Eldon*; and he stated his opinion to be, that the children born after the date of the will did not take. But as *Thomas* and *Jeremiah* were co-plaintiffs with the elder children, so that the different plaintiffs had adverse interests in the question, he refused to make a decree; and the cause stood over, in order that *Thomas* and *Jeremiah* might be made defendants.

The record having been brought into a proper form, the cause came on again for hearing.

Mr. *Shadwell* and Mr. *Preston*, for *Thomas* and *Jeremiah*.

As to the intention of the testator, apparent on the face of the will, no reasonable doubt can be entertained. He enumerates four children of *Martha Davies*, who were then living, and who were all illegitimate, and he classes along with them "every other child born of the body of *Martha Davies* in his lifetime." He contemplated the likelihood of the continuance of his intercourse with this woman. *Thomas* and *Jeremiah* answer the description of "children of her body:" they come within the words of the will, and were unquestionably objects of the testator's bounty; and there is no reason why the intention of the testator should not in this case have full effect. The objection is, that they are illegitimate, and were not *in esse* at the date of the will. But it has never been decided that a bequest to future illegitimate children is void. "I know no law," says Lord *Eldon*, in *Wilkinson v. Adam* (a), "against devising to the children of a woman, whether natural or not, as that creates no uncertainty. The difficulty arises upon a devise

(a) 1 V. & B. 446—468.

to devise to the children of a particular man by a woman to whom he is not married." And again, "Whether the cases cited from Lord *Coke* (a), which are all cases of deeds, have necessarily established that no future illegitimate child can take under any description in a will, whether that is to be taken as law, it is not necessary to decide in this case. I will leave that point where I find it, without any determination." It is true, where the children are described with reference to the father, a bequest to them may fail; because it must be uncertain who is the father of an illegitimate child. In *Metham v. The Duke of Devon* (b) the gift was to the natural children of the Duke; and it was held that an illegitimate child in *ventre sa mere* could not take, because it had not acquired a name by reputation. But where they are described as the children of a particular woman, the objects are as certain as if they were legitimate. In *Blundell v. Dunn* (c) a bequest to an illegitimate child not born in the testator's lifetime, but described as the child "with which Sarah is now *en-ciente*," was sustained.

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MORTIMER
v.
WEST.

Besides, the codicils operated as a republication of the will except with respect to the freehold, and the will must be considered as speaking from the date of the last codicil; so that *Thomas* and *Jeremiah* will be entitled to a share of all the personal estate, as having been *in esse* at the time when the testamentary disposition was made. *Habergham v. Vincent*. (d)

In *Metham v. The Duke of Devon*, a deed poll was considered to be in the nature of a codicil to the will; and the gift was not confined to illegitimate children
born

(a) *Co. Lit.* 3 b.

(b) 1 *P. Wms.* 530.

(c) Cited in 1 *Madd.* 435.

(d) 1 *Ves. jun.* 410.

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v.
WEST.

born at the date of the will, but was extended to all who were born before the date of the deed poll.

Mr. Sugden, Mr. Blackburn, Mr. Martin, and Mr. Stuart, *contra*.

Metham v. The Duke of Devon establishes the proposition, that a bequest to future illegitimate children is void; and there is no authority for making a distinction between illegitimate children described as being the children of a particular mother, and those who are described as the children of a particular father. *Arnold v. Preston* (a), *Earle v. Wilson* (b), *Wilkinson v. Adam* (c), *Bayley v. Snelham* (d), *Swaine v. Kennerley* (e), *Beachcroft v. Beachcroft* (g), *Kenebel v. Scrafton* (h), *Blodwell v. Edwards*. (i)

Even if an express gift to future illegitimate children could be sustained, no such gift occurs in this will. The bequest is "to every other child born of the body of *Martha Davies*," which must mean every legitimate child. Suppose *Martha Davies* had married, and had had legitimate children, would they not have taken? and could it have been argued, that her after-born illegitimate children by the testator, and her after-born legitimate children by another man, were to take conjointly?

The fact of a codicil having been made after the births of *Thomas* and *Jeremiah* is altogether immaterial: it cannot alter the construction of the will, or render valid a bequest which was void *ab initio*, except so far

(a) 18 *Ves.* 288.(b) 17 *Ves.* 528.(c) 1 *V. & B.* 422.(d) 1 *Sim. & Sta.* 78.(e) 1 *Ves. & B.* 468.(g) 1 *Mad.* 480.(h) 2 *East*, 530.(i) *Cro. El.* 509..

far as it might operate for the benefit of legitimate children.

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MORTIMER
v.
WEST.

July 19.

The LORD CHANCELLOR.

It was contended in this cause, that *Thomas* and *Jeremiah*, who were not born at the date of the will, were entitled to a share of the whole property, because the children were described with reference to the mother; and that, even if they were excluded from the freeholds, they would participate in the leaseholds and copyholds, because they were born before the date of the last codicil, which was to be considered as a republication of the will, and as fixing the time from which the will would speak.

It is not necessary for me to give an opinion on all the points which were argued. The terms, which describe the objects of the bequest, are general — “every other child born of the body of *Martha Davies*.” Now where there is a bequest to children generally, legitimate children must be meant, unless it is shewn by something amounting to necessary implication, that the testator intended that the bequest should be to illegitimate children. Here there is nothing to shew by necessary implication, that the testator intended that illegitimate children should take. He has not even limited the bequest to his own children by *Martha Davies*, and for a very obvious reason — because it was clear, that a bequest to unborn illegitimate children, describing them by reference to the father, would be altogether invalid.

Thomas and *Jeremiah* are not entitled to take any part of the property, either under the will or by the operation of the codicil.

1827.

May 18
July 26.

WALDRON v. HOWELL.

The equity of redemption of a leasehold for years, with a covenant for perpetual renewal, is not an interest in real estate within the meaning of the 53 G. 3. c. 102. s. 19.

The assignee of an insolvent is not bound, under that section, to dispose of such an equity of redemption by public auction.

In a suit by the assignee of an insolvent to impeach a sale, which a former assignee had made, of an equity of redemption, the insolvent is not rendered a competent witness for the Plaintiff by releasing his interest in the residue of his estate.

A PIECE of ground had been assigned, subject to a yearly rent, to *Howell* and *Watkins*, their executors, administrators, and assigns, as tenants in common, during the residue of a term of thirty-nine years and nine months, created by a lease dated the 4th of *June* 1807; and they were also, by the assignment of that lease, entitled to the benefit of a covenant contained in it for the renewal of the term at the end of every fourteen years, on the payment of a fine certain. Portions of this ground were afterwards let out on building leases. In *November* 1813, *Watkins* mortgaged his moiety to *Howell*. In *August* 1815, *Watkins* took the benefit of the insolvent act; and, on the 4th of *June* 1817, his estate and effects were conveyed and assigned, under the authority of the insolvent debtors' court, to *Poole*, who had previously been chosen assignee. *Poole* did not dispose of the insolvent's interest in the leasehold premises by public auction; but, in *September* 1817, he sold by private contract, and conveyed, the equity of redemption in *Watkins's* moiety to *Howell*, the mortgages of that moiety, and the owner of the other moiety. *Howell* afterwards conveyed part of the premises to one *Lewellyn*. In *October* 1818, *Poole* was, by an order of the insolvent debtors' court, discharged from being assignee, and the present Plaintiff was appointed assignee in his stead.

The Plaintiff, in his bill filed against *Howell* and *Lewellyn*, insisted, that the sale by *Poole* to *Howell* was void; first, because it was made fraudulently; and, secondly, because a sale by private contract was not

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authorised by the provisions of the 53 G. 3. c. 102., which was the act for the relief of insolvent debtors in force at the time of the transaction.

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WALDRON
v.
HOWELL.

The Vice-Chancellor decided against the Plaintiff on both points, and dismissed the bill without costs.

The Plaintiff appealed.

On the point of fraud, the Lord Chancellor was of opinion that the alleged fraud was not made out on evidence.

The only other question in the cause was, whether, under the 53 G. 3. c. 102. s. 19., the assignee was not bound to have sold the insolvent's interest in the leasehold by public auction.

The eighteenth section of that act provides, among other things, "That all the estate, right, title, interest, and trust of every prisoner who shall be discharged by virtue of this act, of, in, and to all the real estate, as well freehold as copyhold or customary, and of, in, and to all the personal estate, debts, and effects of every such prisoner, shall, &c. be vested in the person or persons to whom the same shall, by the order of the same court, be directed to be conveyed and assigned; and the conveyance and assignment shall, together with this act, be good and effectual in law to vest the estate and effects therein comprised in the person or persons to whom the same shall, by order of such court, be directed to be conveyed and assigned, as, her, or their heirs, executors, administrators, and assigns, according to the estate and interest which the prisoner had therein." The nineteenth section enacts, That every such assignee or assignees as aforesaid shall,

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shall, with all convenient speed, after his, her, or their accepting such assignment or conveyance, use his, her, or their best endeavours to receive and get in the estate and effects of every such prisoner, and shall, with all convenient speed, make sale of all the estate and effects of such prisoner vested in such assignee or assignees; and if such prisoner *shall be interested in or entitled to any real estate, either in possession, reversion, or expectancy, the same*, within the space of two months after such assignment and conveyance, *shall be sold by public auction* in such a manner and at such place or places, as the major part of the creditors of such prisoner entitled to the benefit thereof, who shall assemble together on any notice in writing published, &c., shall under his, her, or their hand or hands approve."

Mr *Pepys* and Mr. *Bickersteth*, for the appellant.

The intention of the legislature was to distinguish personal chattels, which pass by delivery, from property which does not so pass, but must be transferred by deed. The former constitute the "estate and effects" which the assignee is to "receive and get in;" and the disposal of these are left to his discretion. But if the insolvent is "interested in or entitled to" any real estate, that interest is to be dealt with differently; and the legislature, in prescribing a different course of dealing with an interest in land, had regard to the nature of such property and of the title to it, and not to the quantity of interest which the insolvent might have. Every consideration, which renders it proper that a sale by auction should be preferred in disposing of a leasehold for lives, applies equally to a term of years; and it could never be meant to bind an assignee to sell a lease for a single life by public auction, and to leave him at full liberty to dispose of a term for 2000 years by private contract. Neither
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in the eighteenth section, nor in the nineteenth, do we meet with the phrase "seised of," or any other expression exclusively applicable to freehold interests. In the former section the words are, "estate, right, title, interest, and trust, of, in, and to real estate;" in the latter, they are, "interested in or entitled to" real estate; and it is impossible to say that he, who has a term for years, has not an estate, right, title, and interest, in the lands. A term for years is not personal estate in the sense in which that phrase is used in the act, when mention is made of "personal estate, goods, and effects," or of "estate and effects," which the assignee is "to receive and get in:" it is a personal interest in real estate, and it is not capable of being received or gotten in. The twenty-sixth section begins thus: "And whereas a prisoner, who may be entitled to and claim the benefit of this act, may be seised and possessed of, or entitled to lands, tenements, or hereditaments, to hold to such prisoner for the term of his or her life, *or other limited estate, &c.*" The words "other limited estate" will include terms for years; so that the legislature appears to have considered terms for years as interests in real estate.

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Mr. Sugden and Mr. West, for *Lewellyn*.

Mr. Horne and Mr. Cooper, for *Howell*.

The argument on behalf of the respondents was, that, in the eighteenth section, the real estate and the personal estate were most explicitly distinguished; that an interest in a term for years is personal estate, and must, therefore, be considered personal estate, and not real estate, within the meaning of the eighteenth section; that *real estate* in the nineteenth section must receive the same construction as *real estate* in the preceding clause; and, therefore, that a term of years did not come within
that

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that description of property which the act ordered the assignee to sell by auction.

The LORD CHANCELLOR.

As I am of opinion that there was nothing fraudulent or improper in the transaction which this bill seeks to impeach, the only question, which remains to be disposed of, is that which arises out of the 53 G. 3. c. 102. In the nineteenth section it is stated, that, if the person taking the benefit of the act “shall be interested in or entitled to any real estate, either in possession, reversion, or expectancy, the same, within the space of two months after such assignment and conveyance, shall be sold by public auction, in such manner and at such place or places, as the major part of the commissioners” shall, in the manner therein mentioned, approve. It was contended by the Plaintiff, that the interest of the insolvent in these leaseholds was an interest in real estate, and, therefore, that the sale ought to have been by public auction, and not by private contract. The Vice-Chancellor held, that the case did not come within the nineteenth section, but that the assignee was authorised to consider the insolvent’s interest in the lease as mere personal estate; and I am of opinion that the judgment of the Vice-Chancellor was correct.

The eighteenth section relates to the vesting of the estate and interest of the insolvent in the assignee; and the nineteenth section directs the assignee how to dispose of the property thus vested in him. It is material, therefore, in considering the latter section, to consider the language of the former section. The eighteenth section enacts, that “all the estate, right, title, interest, and trust of every prisoner, who shall be discharged by
virtue

virtue of this act, of, in, and to all the real estate, as well freehold as copyhold or customary, and of, in, and to all the personal estate, debts, and effects of every such prisoner," shall be vested in the assignees. Here, therefore, a precise distinction is drawn between the title and interest of the insolvent in real estate and his title and interest in personal estate. Now it is perfectly clear, that an interest, such as the lease in question, is personal estate, and not real estate; and it would, therefore, fall, so far as the eighteenth section is concerned, under the latter of the two species of property which are there mentioned.

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The nineteenth section prescribes the course which the assignee is to pursue. It directs him generally to make sale of all the estate and effects of the insolvent; but, as to the real estate, he is to sell it by auction in such manner and in such place as the major part of the creditors assembled on a certain notice shall approve. The real estate spoken of here must be considered with reference to the preceding clause; and, therefore, a mere-chattel interest cannot be considered as real estate within the meaning of the nineteenth section.

Decree affirmed.

The insolvent had released to the Plaintiff all his interest in the residuum of his estate, and had been examined as a witness in support of the case of fraud and collusion stated by the bill.

Mr. Sugden objected, that the witness was interested, because his evidence was tendered in order to increase the fund divisible among his creditors, and thereby to diminish his future liability.

Mr.

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Mr. *Pepys* relied on the 54 G. 3. c. 28. s. 58, which enacts, "that, in all cases whatsoever, the insolvent, upon his releasing any interest he or she may have in the residuum of his or her estate, shall and may be admitted as a good and sufficient witness in any action or cause to be instituted by his or her assignee or assignees for the recovery of any debts due to the said insolvent, in the same manner as a bankrupt may after obtaining his certificate." This was, in one sense, a suit to recover a debt due to the insolvent; for the result of the mortgage account might be to shew that a sum was due from *Howell* to the insolvent. At all events, the case came within the spirit of the clause.

Mr. *Sugden*, in reply, denied, that the evidence was tendered to recover a debt; and even if it had been tendered for that purpose, he questioned, whether an insolvent could be a witness to increase his estate, any more than a person, who had been twice a bankrupt, could be a witness though he had obtained his certificate, if, in consequence of the dividend under the second commission not amounting to fifteen shillings in the pound *, his future effects remained liable.

The LORD CHANCELLOR held, that the insolvent was not a competent witness, and rejected his evidence.

6 G. 4. c. 16. s. 127.

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FARQUHARSON v. PITCHER.

June 15. 27.

THE Plaintiff had obtained an injunction; and the Defendant, having put in his answer, gave notice of a motion to dissolve the injunction. This motion, from the state of business in the court, stood over from time to time; and before it was made, three terms having elapsed without any proceedings having been taken, the Defendant, at the first seal after *Easter* term, obtained an order of course, dismissing the bill for want of prosecution.

A Defendant may dismiss a bill for want of prosecution, pending a notice given by him of a motion to dissolve an injunction, which the Plaintiff had obtained.

The Plaintiff moved to discharge the order.

Mr. *Agar* and Mr. *Knight*, in support of the motion.

The Defendant, by giving notice of motion to dissolve the injunction, undertakes to do a certain thing in the cause; and till he does that thing, he cannot be allowed to put an end to the cause in this manner. He must either make his motion or abandon it, before he can get rid of the suit by an order of course; and until he apprises his opponent that the notice is no longer to be considered as in force, he cannot take a step the effect of which is to annihilate the suit and the notice along with it. While the motion remains in suspense, the Plaintiff cannot determine whether to amend or to file a replication.

Mr. *Horne* and Mr. *Swanston*, *contrd.*

An injunction is merely an incidental proceeding, which does not bring the cause nearer to a hearing. It is

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is settled that the existence of an injunction will not prevent a bill from being dismissed, *Hannam v. The South London Water Works Company* (a); and a plaintiff cannot be in a better situation, because notice has been given of a motion to dissolve the injunction, than if he had not received such a notice. If the motion had been made and refused, it must be admitted that the Defendant, notwithstanding the failure, might instantly have dismissed the bill as of course: why should an injunction, which is the subject of a motion to dissolve, have more efficacy in keeping a suit in court, than an injunction which has been sustained against the attempt to get rid of it?

June 27.

The LORD CHANCELLOR held, that the order dismissing the bill was regular, and refused the motion with costs.

(a) 2 Mer. 61.

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JENKINS v. GOULD.

May 22.

June 19.

Nov. 5.

THE Defendant *Gould* had for many years been the solicitor of *Jenkins*, and the manager of his estates: he had acted also as his agent in raising money, and in negotiating bills to the amount of several hundred thousand pounds: and, in the course of these transactions, very large sums had been received and disbursed by him on *Jenkins's* account. In November 1815, *Jenkins* executed a conveyance of certain estates to *Gould* and *Baroden*, upon trust to sell. The proceeds were to be applied in discharging all drafts or bills on which *Gould* was liable for *Jenkins*, and in paying to *Gould* all losses or expenses which he had sustained, or might thereafter sustain, in respect of any such bills or drafts, as well as all sums of money and costs then due to him from *Jenkins*, or which should thereafter become due. This security was limited to a sum not exceeding 20,000*l*.

The bill charged that *Gould* had never delivered any account of his receipts and payments, or of the expenses and charges incurred by him; and it prayed a general account, together with a declaration that the security of November 1815 was void.

Gould, by his answer, after entering into various details respecting the nature of the transactions in which he had

A. had long employed *B.* as his steward, professional adviser, and general confidential agent; disputes having arisen between them, an agreement was entered into between *B.* and a clergyman acting on behalf of *A.*, by which a gross sum was to be paid to *B.* in lieu of all his claims, but no accounts or vouchers were rendered or produced by *A.*, nor was any bill of costs delivered; that agreement will not protect *B.* from rendering an account to his principal.

Disputes existing between *A.* and his solicitor,

Gould, and confidential agent *B.*, which involved long and intricate matters of account, an authority was given by *A.* to a third person to settle any accounts in which he, *A.*, had an interest, and to compromise any claims which he might have: such an authority will not empower that third person to make an agreement, without the production or examination of any account, that a gross sum shall be paid to *B.* in lieu of all his demands on *A.*

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been for many years concerned as the solicitor, agent, and receiver of the Plaintiff, stated, that, disputes having arisen between him and the Plaintiff, he, in *January* 1817, had several interviews with the Reverend *William Cockburn*, who was duly authorised to come to an agreement with him; and that, after a very long discussion, he (*Gould*) and *Cockburn*, as the agent of *Jenkins*, concluded and signed an agreement. By this agreement, which was dated the 4th of *April* 1817, it was stipulated, that *Jenkins* should make certain payments, and that the conveyance of *November* 1815 should remain as a security to *Gould* for 5000*l.*, with interest from the 23d of *January* preceding, and also as a security against some outstanding bills and drafts of *Jenkins* upon *Gould*. The performance of the agreement by *Jenkins*, was to be^d in full of all demands which *Gould* had against him, except a specified claim, in which two other persons were interested along with *Gould*.

The Defendant stated, that, in reliance upon this agreement, he had not taken so much care of the evidence and documents connected with the transactions between him and *Jenkins* as he otherwise would have done; that, from the time it was entered into, he had permitted *Jenkins* to deal with the property included in the security of *November* 1815, as if it had been absolutely his own; that *Jenkins* had done various acts, by which he recognised and confirmed the arrangement of *April* 1817; and that, at the time when it was concluded, much more than 5000*l.* was due to him, *Gould*. He added, that, from the extent and multiplicity of the bill transactions, and from the lapse of time, it had become almost impossible to make out any accurate or satisfactory accounts of them; and he admitted that he had never rendered any regular or written account of the monies received and paid by him, or of the costs and charges which

which he claimed, save that, at the time of his receipts or payments, he had always informed *Jenkins* of what he had so received or paid.

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The power of attorney, under which *Cockburn* had acted for *Jenkins* in this affair, authorised him to settle any accounts in which the Plaintiff was interested, and to compound or compromise any claim or demand which he had. No professional man had been concerned for *Mr. Jenkins* in any of his transactions with *Gould*.

At the hearing, the power of attorney to *Cockburn* was not sufficiently proved by the defendant: and, by a decree of the Vice-Chancellor, dated the 8th of *December* 1823, it was referred to the Master to inquire, whether the agreement of the 4th of *April* 1817 was entered into with the authority of the Plaintiff *Thomas Jenkins*, or whether he afterwards in any, and what manner, recognised and confirmed the same; and the Master was to be at liberty to state any matter specially at the request of either party.

The Plaintiff appealed.

Mr. Sugden and *Mr. James*, for the Plaintiff.

The decree proceeds upon the principle, that, if the power of attorney were executed by *Jenkins*, the agreement, insisted on by the answer, would be a bar to the general account which we pray. Now we contend, first, that the agreement, even if *Cockburn* had power to enter into it, is no bar to the account; and, secondly, that to enter into it was not within the scope of *Cockburn's* authority.

First, what were the mutual relations and circumstances of the parties, when the alleged agreement was made? *Gould* was the solicitor, agent, and receiver of

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Jenkins; in the dealings between them, monies to an enormous amount had passed through the solicitor's hands; *Jenkins*, it is clear, was in pecuniary embarrassments, and exposed to pressure on the part of one who had long been his professional adviser and the manager of all his concerns. In this situation of things, disputes having sprung up between them, an arrangement is said to have been entered into; but *Gould* admits that he never rendered any account of his dealings; no documents were produced; not even was any bill delivered of the costs, for the payment of which provision is made. All the information, which was necessary to enable *Jenkins*, or any friend who might act for him, to understand what his circumstances or rights were, lay within the knowledge and power of *Gould* alone. It would be contrary to the tenor of all the authorities, if an agreement, entered into under such circumstances, should protect a solicitor, agent, and receiver, from rendering an account to his client and employers. *Drapers' Company v. Davies* (a), *Newman v. Payne* (b), *Lord Hardwicke v. Vernon* (c), *Beaumont v. Boulton* (d), *Detillen v. Gale* (e), *Mortlock v. Buller* (g), *Jones v. Tripp* (h).

Secondly, the power of attorney authorised *Cockburn* to settle any account in which *Jenkins* was interested; and the agreement of the 4th April 1817 was, it is said, a settlement of accounts. But accounts cannot be settled, till accounts are rendered; and here no accounts were rendered, no vouchers were produced. *Cockburn* agreed that a large sum should be paid to *Gould*, without having had the means of knowing whether or not any thing was due to him.

Mr.

(a) 2 *Atk.* 212. 295.(b) 2 *Ves.* jun. 199. 4 *Bro.*
C. C. 550.(c) 4 *Ves.* 411.(d) 5 *Ves.* 485. 7 *Ves.* 599.(e) 7 *Ves.* 583.(g) 10 *Ves.* 292.(h) *Jac.* 322.

Mr. *Horne* and Mr. *Duckworth*, for the Defendant.

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The agreement cannot be impeached at the hearing, for it is not impeached by the bill. The Plaintiff, if he meant to rely on the case he now sets up, ought to have amended his bill, and have alleged that the agreement, regard being had to the circumstances of the parties, and the relation subsisting between them, was fraudulent and void; and then the Defendant would have gone into evidence to prove, that the agreement was entered into fairly and deliberately.

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In fact, however, the arrangement which was entered into, cannot be impeached. The parties were at arm's length; an intelligent agent acted on behalf of the Plaintiff; and, if accounts were not produced, it was because the very object of the compromise was to supercede the necessity of entering into a long and intricate investigation. It would be most oppressive to drive the Defendant now to a general account, when many of the vouchers and documents must be lost, which he would have taken care to preserve, had he not been induced to rely on a compromise made so deliberately.

Both parties have acted upon the agreement, which the Plaintiff now seeks in part to set aside. Portions of the property, included in *Gould's* security, have, with his concurrence, been sold by *Jenkins*; of which sales not one could have taken place, if the agreement had not been considered as controlling *Gould's* security. These sales are, in fact, so many confirmations of the agreement.

Mr. *Sugden*, in reply.

If, to impeach the agreement stated by the Defendant, it had become necessary to introduce facts which did

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not appear in either the original bill or the answer, it would have been proper to have amended the bill, in order to have placed the new matter on the record. But we say that the agreement, as stated in the answer, is not a valid and binding transaction. The bill shews a *prima facie* title in the plaintiff to an account; and that title is admitted by the answer. But the Defendant seeks to protect himself by saying, that a certain agreement has put an end to all questions between the parties. He therefore must shew that the agreement was made, and that it is valid at law and in equity. But his own statement is, that no bills of costs were delivered,—that no account was rendered for examination, or attempted to be taken,—that no vouchers were produced; and our proposition is, that an alleged settlement of accounts, made between a solicitor and his client under such circumstances, is a transaction which this Court will not recognise.

The subsequent sales of parts of the property, comprised in *Gould's* security, cannot be treated as a confirmation of the agreement. A court of equity does not allow a confirmation of a vicious instrument to be obtained by surprise; the attention of the party must be drawn to it, and the thing must be done with an intent to confirm, and with a full knowledge of the circumstances of the case. Here, the acts referred to were not done with any intent to confirm the agreement; and *Mr. Jenkins* was then in the same ignorance of the state of his affairs, as when the agreement was made. His steward, agent, and confidential legal adviser was in the exclusive possession of that knowledge, which ought to have been communicated to *Mr. Jenkins*, or to *Mr. Cockburn* on his behalf, before any arrangement was concluded. In fact, the sales were for the benefit of *Gould* himself; for the proceeds were applied, according

to the trusts of the deed of 1825, in discharging incumbrances prior to his.

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The LORD CHANCELLOR.

Nov. 5.

Daniel Gould, the Defendant in this case, was for several years the solicitor, agent, and receiver of *Thomas Jenkins*. He received and paid on Mr. *Jenkins*'s account very great sums of money, and was engaged with him as his agent, in bill negotiations, to an immense amount. He claimed to be entitled to very large sums from Mr. *Jenkins* for costs and charges as a solicitor and manager, and otherwise, in the course of these various transactions. It was admitted that he had not delivered any bill of costs as a solicitor, or rendered any written or general account of his money and other dealings, either to Mr. *Jenkins* or to any person on his behalf: but he insisted that a large balance was due to him, upon the mixed account, from Mr. *Jenkins*. It was stated by Mr. *Gould*, that he had defended many actions at law for Mr. *Jenkins* in respect of dishonoured bills; but of such actions he had rendered no account. It further appeared, that a mortgage of Mr. *Jenkins*'s estates had been executed in the month of *November* 1815 to the Defendant, but which mortgage, as the Defendant alleged, was executed at the pressing instance of Mr. *Jenkins* himself. The object of this instrument was to secure the Defendant from loss in respect of the transactions between him and Mr. *Jenkins*. The deeds were prepared by or under the direction of the Defendant himself; and no solicitor or other professional person was consulted by Mr. *Jenkins*, or acted for him in the course of the transaction.

It further appeared that, in the year 1817, a Mr. *Cockburn*, a clergyman, acting on the part of Mr. *Jen-*

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Jenkins, came to a settlement with the Defendant; that a power of attorney was executed by Mr. *Jenkins* to Mr. *Cockburn*; and that the agreement, dated the 4th of *April* 1817, set out in the answer, was signed by *Daniel Gould* and by Mr. *Cockburn*, as the attorney of Mr. *Jenkins* under that power; but no solicitor was employed on that occasion by Mr. *Jenkins*. By this agreement 5000*l.* was to remain secured to Mr. *Gould*, and various payments were to be made by Mr. *Jenkins*, which being done, this settlement was to be in full of all demands.

The Defendant relies upon this agreement as a defence to the Plaintiff's prayer for an account. In the answer, which sets up this agreement, the above facts are disclosed; and it is also admitted that the agreement was signed by Mr. *Cockburn* without any bill of the extensive law charges having been produced to him, and without any such bill ever having been submitted to the Plaintiff, or even made out; and also without any thing that could be considered as an account of the receipts and payments of Mr. *Gould* in the course of his various and complicated transactions with and on account of Mr. *Jenkins*. It was contended that, under these circumstances, Mr. *Cockburn* was not authorised in what he did by the power of attorney. By that instrument he was empowered to settle any account or accounts in which the Plaintiff was in any way interested or concerned with any person or persons, and to pay or receive the balance, and also to compound or compromise any claim or demand which the Plaintiff might have. I certainly cannot understand what right Mr. *Cockburn* had, acting under this power, to dispense with the production of Mr. *Gould's* account, especially in such long and complicated transactions. How could he properly settle the account,
when

when no account was rendered, and when he had no means of investigating the particulars of it?

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But without dwelling upon this point, even assuming that the settlement had been made by Mr. *Jenkins* himself, would it, under the circumstances of this case, have formed a sufficient answer to the application for an account. Mr. *Gould* had stood in the confidential situation of solicitor, agent, and receiver of Mr. *Jenkins*; and, while in that situation, (no professional person being employed for Mr. *Jenkins*), he had obtained from him a mortgage of his estates as a security for the balance of his account. It is admitted that he had never delivered any bill of costs; that he had never rendered any account of his receipts and payments; that he had never prepared any such account; that he had applied to his own use, and without any statement of the amount, he produce of some of the bills drawn or accepted by Mr. *Jenkins*. Could a settlement, under such circumstances, (Mr. *Jenkins* being, by means of the mortgage and otherwise, so in the power of Mr. *Gould*), be conclusive?

But it was urged by Mr. *Gould*, that the transactions were so extensive and complicated, that it would have been extremely difficult, if not impossible, to have made out an account.

As a professional man, he must have known that it was his duty to keep a regular account of his receipts and payments. The more extensive the transactions, the more imperative was this duty; and if he has neglected to perform it, the inconvenience and the loss resulting from the omission must fall upon himself. If the parties, Plaintiff and Defendant, had then met, and, without the production of any bill of costs or any account,

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count, had, under the circumstances which I have mentioned, made the settlement which is now relied upon, — considering their relative situation of solicitor and client, agent and principal, during these transactions, which were all complicated together, — it would, I think, be going very far to say, that this Court would not, under such circumstances, order the account to be investigated.

It was urged, that the settlement had been confirmed by the subsequent acts of *Mr. Jenkins*; and that, upon the faith of the settlement, he had been allowed to sell a part of the property comprised in the deeds of *November 1815*. It is not, however, I think, stated, that the security, still remaining in the hands of *Mr. Gould*, is not sufficient for his protection: and, as to the effect of the alleged acts of confirmation, I do not think they materially vary the case, as it does not appear that, after the settlement, any further information was communicated as to the state and particulars of the accounts between the parties.

It was urged, that the Defendant might, from his reliance upon the agreement, sustain inconvenience by the loss or destruction of vouchers. But I think, considering the nature of the settlement, that he was not justified in placing reliance upon it: and the loss or destruction of vouchers is not so stated, as to satisfy me, that any real inconvenience is likely to be sustained on this account.

I think, therefore, there must be a reference to the Master to take the account; and that the consideration of the other points should be deferred, till after the Master's report.

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BETWEEN

His Majesty's ATTORNEY-GENERAL, at the relation of MATTHEW BARRETT and GEORGE HAYMAN, Citizens and Inhabitants of the City of Exeter, - - - - Informants,

June 25.
Oct. 30.
Nov. 13.

AND

The Mayor, Bailiffs, and Commonalty of the City of EXETER, - - - - Defendants.

THE instruments and facts, upon which the questions in this cause arose, are stated in the preceding volume.*

Though Lord *Eldon* had expressed his opinion on the different points which were discussed, judgment had not been formally pronounced when he resigned the Great Seal. The cause was, therefore, re-argued before Lord *Lyndhurst*.

The arguments were to the same effect as before.

In the reign of *Henry VII.*, lands were given to the corporation of *Exeter* and their successors for the aid and relief of the poor citizens and inhabitants of *Exeter*, "who are heavily burthened by fee farm rents of that city, and other impositions and

The

tallies:" the rents ought to be applied to the relief of the poor *Exeter* not receiving parish relief.

It is not a due administration of such a charity to apply the rents to the payment of fee farm rents due from the city, repairing the gaol, maintaining the prisoners, and other similar public purposes.

When, in consequence of a mistaken construction of a doubtful instrument, the rents of a charity estate have been for a series of years applied by a corporation to public purposes not warranted by the nature of the charity, the corporation will not be charged for such misapplication.

The Court will not compel a corporation to produce their title deeds, and will not direct an inquiry as to the property which they possess applicable to general corporate purposes, in order to ascertain whether there is any fund which can be applied in making good a breach of trust committed by them in the management of charity funds.

* See 2 *Russell's Rep.* 45.

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ation of
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The only question, which was argued upon this appeal, was, as to that part of the decree which orders and directs in what manner the rents and profits of the estate in question are now applicable. The purposes, to which, it appears, these rents, mixed up with other funds of the corporation, have hitherto been applied, are not, I think, authorised by the terms of the grant. The Defendants state, that certain fee farm rents have been paid, and that certain public expenses have been defrayed from this fund, the latter of which must otherwise have been raised by public levies and impositions. But the defraying of these charges and expenses does not, I think, fulfil the intention of the donor. The estate does not appear to have been given for that purpose. It was given to relieve the wants of the poor. It is true, the poor are described as greatly oppressed by these charges and impositions. But the payment of them, except so far as they fall upon the poor, cannot on that account be considered as a fulfilment of the object of the charity, which was intended exclusively for the poor, and not to be shared by, or applied for the benefit of, the rich. The principle of these observations will apply equally to the fee farm rents, the expenses of the gaol, and, in general, to the other objects upon which the rents and profits are stated to have been employed.

Viewing the subject in this light, I do not see in what manner the intention of the grantor could be better effected, than by the decree as pronounced by the late Vice-Chancellor. If the rents and profits are applied in paying such expenses as would fall upon the county rate, or be defrayed by any other public tax or contribution, they would be applied in aid of the rich, as well as of the poor, and in a much larger proportion in favour of the former than of the latter. I have stated,
that

that I consider such an application of them as inconsistent with the declared object of the founder of the charity. If they were given in support of the poor, who receive parish relief, they would in like manner be applied in aid of the rich. It seems, therefore, that the best mode of administering that portion of this fund which is applicable to the poor, so as to give effect to the intention of the founder, will be, to employ it in aid of the poor citizens and inhabitants of *Exeter*, not receiving parish relief.

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 ation of
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It is true, that this appropriation of it may have the effect of preventing some individuals from applying for relief, who, without such assistance, might be under the necessity of doing so; and that thus, indirectly, the benefit of the fund may be shared in a degree by the rich: but this is a contingent effect which cannot be avoided; and, after looking at the subject in the different views in which it has presented itself to my consideration, I cannot suggest any better mode of giving effect to the object of the grant, than by declaring the rents and profits of the estate to be applicable to the purposes pointed out in the decree of the late Vice-Chancellor. It was not disputed, that the inquiries as to the chapel were properly referred to the Master; and the question, which I have considered, being the only point upon which any objection was made, the decree should, I think, be affirmed.

The decree having been affirmed on the principal point, a question was raised by the Plaintiffs, with respect to those parts of the decree which directed the Master to inquire, how the fines, received upon the last renewals of the leases of the estate, had been applied, and whether the corporation possessed any property applicable to general corporate purposes.

Nov. 13.

Sir

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ation of
Exeter.

Sir *Charles Wetherell* and Mr. *Sugden*, for the Corporation.

A general inquiry into the property of a corporation, accompanied, as it is here, with directions which will compel the Defendants to produce all their title deeds, must be oppressive, and may work great injustice. What is there to call for such an inquiry here? It can only be intended to ascertain what funds there are, out of which compensation to some amount may be made to this charity, for the partial misapplication of its funds. But that misapplication is admitted not to have been corrupt; the monies were expended on objects of public utility: the fines, received upon the last renewals, have been applied in the same manner; and, therefore, inquiry with respect to them is superfluous.

Mr. *Agar*, *contra*.

The charity lands have been let on leases which are subsisting; and unless the fines, which were paid when those leases were granted, be accounted for, the charity will be without any income till those leases expire. There is no evidence how these fines were actually expended. The inquiry into the property of the corporation is necessary, in order that the Court may see, whether they are in possession of funds, not affected by charitable trusts, out of which the balance can be paid, which in this suit must be found to be due from them.

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That part of the decree which directs an inquiry into the property of the corporation, and relates to the production of their title deeds, must be omitted. If there were any evidence that the fines paid on the last renewals had been applied to the public and corporate purposes which have been mentioned, I would not direct
any

any inquiry concerning them. But I have no such evidence; I cannot say that there is no part of those fines still remaining in the hands of the corporation; and, therefore, that inquiry must be directed.

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June 19.
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BY an indenture of settlement, dated on the 6th of August 1798, and made and executed between and by *George Charles Brathwaite* (afterwards *Sir George Charles Brathwaite Boughton*) of the first part, *Eliza Boughton*, who was then an infant, and the persons who had been appointed her guardians, of the second part, and four trustees of the third part, (after reciting that *Eliza Boughton* was, under the will of *Sir Edward Boughton*, Bart., tenant in tail of certain real estates; that, upon the treaty for a marriage, which was in contemplation between her and *G. C. Brathwaite*, it was agreed, that, when *Eliza Boughton* should attain the age of twenty-one years, these estates should be settled upon certain uses for the benefit of *George Charles Brathwaite*, *Eliza Boughton*, and the issue of the marriage, in manner therein mentioned; and that, in consideration thereof, *G. C. Brathwaite* had agreed to pay or secure the sum of 36,000*l.* in manner therein mentioned,) it was

In contemplation of a marriage between *A.* and *B.*, settlements were made of real estate belonging to *B.*, the intended wife, and of personalty belonging to *A.*, the intended husband, upon uses and trusts, which, after the solemnization of the marriage, were to arise for the benefit of the husband and wife, and their issue; the marriage ceremony was performed, and the parties lived together as husband and wife; but, after the lapse of more than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlement; some time afterwards a new settlement, in contemplation of marriage, was made, including the same property as the former, but different from the former in the interests given to the issue, as well as in other provisions; the parties then intermarried, and there was issue of the marriage: Held,

That the first settlement, being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personalty, were regulated by the second settlement.

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was witnessed, that, from and after the solemnization of the marriage, the trustees should stand possessed of 8000*l.* Navy five per cent. annuities, (transferred to them by *G. C. Brathwaite*, and which, at the price of the day, were worth 6100*l.*) upon the trusts which were therein declared: and *G. C. Brathwaite* covenanted with the trustees to pay or transfer to them, within eighteen months after the solemnization of the marriage, 29,900*l.* being the residue of the 36,000*l.* upon trusts similar to, though in some respects different from, those which had been declared of the stock. Under both sets of trusts the issue of the marriage took considerable interests.

The marriage was solemnized; Mr. *Brathwaite* took the name of *Boughton*; and *Elizabeth Boughton* attained her full age. Afterwards, in 1799, a recovery was suffered, and her real estate was settled, subject to a joint power of appointment reserved to her and her husband, on the husband for life, remainder to the wife for life, remainder to the issue of the marriage in strict settlement. The uses, thus declared, were in some respects different from those which had been specified in the articles of agreement made previous to the marriage.

Eliza Boughton was the reputed natural daughter of Sir *Edward Boughton*, by a woman of the name of *Davis*, and her marriage had taken place with the consent of guardians appointed by the Court of Chancery. After the recovery had been suffered, it was discovered, that, at the time of her birth, her mother was the wife of *John Kaye*, who was still alive; and it was conceived that the marriage was void, for the want of the consent of the person, who, in the eye of the law, was to be considered the father of *Eliza Boughton*. Measures were, therefore, adopted for the purpose of annulling the former settle-

settlement, and relieving the parties from their mutual contracts.

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With this view, a deed was executed, dated on the 16th of *July* 1800, between *G. C. B. Boughton* of the one part, and *Eliza Boughton* of the other part. This deed, after mentioning the indenture of the 6th of *August* 1798, the marriage, and the subsequent discovery of its invalidity, recited, that, inasmuch as the indenture of the 6th of *August* 1798 was made and executed, and the marriage was contracted and attempted to be solemnized, without the consent of *John Kaye*, the father and natural guardian of *Eliza Boughton*, it was understood that the said supposed marriage between *G. C. B. Boughton* and *Eliza Boughton*, and the said recited indenture, and all other settlements and contracts or agreements for settlement, made, entered into, or executed in contemplation or consideration of such marriage, were absolutely null and void; that *G. C. B. Boughton* and *Eliza Boughton* were then at full liberty either to marry again, or to remain single and unmarried, as they might think proper; that, if they should determine to marry again, they were competent and at full liberty, either before or after such new marriage, to enter into, and make such other articles or settlements, of or concerning their estates or fortunes, or to refuse or omit making any such articles or settlements, as they might think proper; that the sum of 8000*l.* Navy five per cent. annuities then remained vested in the names of the trustees, but that no part of the 29,900*l.*, or of stock to that amount, had been paid or transferred to them pursuant to the covenant; that the said *G. C. B. Boughton*, and *Eliza Boughton*, were agreed and determined not to marry again upon the terms, or under any of the conditions or engagements for making settlements, mentioned in the before-recited indenture; and, in order that, if

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they should thereafter determine to marry again, there might be no reason or pretence to contend that such second or new marriage was agreed upon, or had and solemnized, upon any such terms, or under any such conditions or agreements for making settlements as aforesaid, that they had mutually and respectively agreed to rescind, revoke, and declare absolutely null and void the before-recited indenture, and all and every the covenants, contracts, agreements, trusts, powers, provisos, and declarations therein contained: And by the operative part of the deed it was witnessed, that, in pursuance of this determination and agreement, they, *G. C. B. Boughton* and *Eliza Boughton*, did thereby severally and respectively rescind, revoke, and declare absolutely null and void the before-recited indenture of settlement, and all the covenants, contracts, agreements, trusts, powers, provisos, and declarations therein contained; and they did thereby severally order, direct, and appoint, that the trustees, their executors, administrators, and assigns, should thenceforth stand possessed of the 8000*l.* Navy five per cent. annuities, in trust only for *G. C. B. Boughton*, his executors, administrators, and assigns, and to transfer and pay the same to him and them, or as he or they should direct or appoint: and *G. C. B. Boughton* did thereby release unto *Eliza Boughton*, her executors, and administrators, all sums of money, which, at any time since the marriage was attempted to be had and solemnized between him and her, she or any person on her account had received out of the dividends of the 8000*l.* Navy five per cent. annuities.

A similar deed had been previously executed for the purpose of revoking the settlement of Miss *Boughton's* real estate; and a second recovery had been suffered.

In

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In 1802, *G. C. B. Boughton* and *Eliza Boughton* again agreed to marry. Previous to this new marriage, deeds were executed, by which the lady's real estates were conveyed to uses different from those of the former settlement. At the same time, another indenture, bearing date the 3d of *April* 1802, was executed by *G. C. B. Boughton* of the first part, *Eliza Boughton*, spinster, of the second part, and *William Fulke Greville*, *Thomas Coutts*, and Sir *Edmund Antrobus*, (who were three of the four trustees named in the deed of the 6th of *August* 1798), of the third part: whereby,—after reciting, that, upon the treaty for the intended marriage, it was agreed on the part of *G. C. B. Boughton*, that, in consideration of the marriage, and of a settlement agreed to be made by *Eliza Boughton*, of all her freehold estates in the county of *Hereford*, to such uses and in such manner as were mentioned in a certain other indenture bearing date on the same 3d of *April* 1802, he, *G. C. B. Boughton*, would secure to be transferred or paid unto *Greville*, *Coutts*, and *Antrobus*, 8000*l.* Navy five per cent. annuities, and 29,900*l.* money, or so much stock as should be of the full value of 29,900*l.*, —it was witnessed, that *G. C. B. Boughton* did, &c. covenant with *Greville*, *Coutts*, and *Antrobus*, their executors, administrators, and assigns, that, in case the intended marriage between him and *Eliza Boughton* should take effect, he would, within the space of twelve months after the solemnization thereof, cause to be assigned and transferred unto these trustees the sum of 8000*l.* Navy five per cent. annuities, standing in the joint names of them and *Richard Sandilands*, but to which capital sum he, *G. C. B. Boughton*, was beneficially entitled for his own absolute use and benefit; and further, that he would, within the space of three years next after the death of his father, pay or transfer to the said three trustees the sum of 29,900*l.*, or an amount of stock of equal value.

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The trusts declared of this stock and money were different, especially as to the interests given to the issue of the marriage, from the trusts of the former settlement.

In *June* 1802 the parties intermarried, and they afterwards had three children, all of whom died in their infancy, except the Plaintiff *Frederica*. There had never been any child of the invalid marriage solemnized in 1798.


In 1809, Sir *G. C. B. Boughton* died; and in the following year his widow intermarried with the Defendant *Dickenson*.

In the mean time, a suit had been instituted for the administration of the real and personal estate of Sir *Edward Boughton*; at the hearing of which, an issue had been directed to try, whether the marriage, solemnized in 1798, was valid. That marriage was found not to be valid; and, on the cause being heard on the equity reserved, a case was directed for the opinion of the Court of Common Pleas on four questions, framed with a view to ascertain, which of the two settlements of the real estate regulated the legal interests of the parties.* A certificate was returned, the effect of which was, that the first settlement of the real estate was, at law, the only existing valid settlement, and that the only subsisting estates were those created by the deed and recovery of 1799.

No further proceedings were had, till after the marriage of *Frederica* with Mr. *Robinson*. She, as the only surviving issue of *G. C. B. Boughton* and his wife, took
a more

* Reported under the name of *Boughton v. Sandilands*, 5 *Tent.* 542—576.

a more beneficial interest under the first settlement than under the second : and, therefore, she and her husband filed their bill, insisting, that it was not competent for *G. C. B. Boughton*, and *Eliza Boughton*, upon the occasion of their marriage in 1802, to revoke the settlement of 1798, and the covenants and agreements therein contained; and that the several deeds and instruments, whereby they revoked or attempted to revoke the prior settlement, were null and void; the more especially, as the indenture of the 6th *August* 1798 was an actual settlement of money in consideration of a marriage which ultimately took place between the parties, though not within the period originally contemplated. The material part of the prayer was, that the trusts of the indenture of the 6th of *August* 1798 might be carried into execution, and that the rights and interests of all parties under it might be ascertained.

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The Defendants insisted, that it was competent for *Sir G. C. B. Boughton*, and *Eliza Boughton*, upon the occasion of their marriage in 1802, to revoke the settlement of *August* 1798, and the covenants and agreements therein contained; that the indenture of the 16th of *July* 1800 was a valid revocation of the indenture of the 6th of *August* 1798; and that the indenture of the 3d of *April* 1802 was a valid settlement of the property comprised in it.

The question in the cause was, which set of trusts bound the 8000*l.* stock, and the 29,900*l.* payable under *Sir G. C. B. Boughton's* covenant — whether the trusts declared by the deed of *August* 1798, or those declared by the deed of *April* 1802.

In arguing this question, another point, necessarily raised, was, whether, though the only subsisting legal

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estates were those which were created by the recovery and deed of 1799, the settlement of 1802 ought not in equity to prevail over that prior settlement.

Mr. Sugden and Mr. Phillimore, for the Plaintiff.

The Court of Common Pleas has certified (a), that the first settlement of the real estate is the settlement which operates on the lands and binds the parties, though the first marriage was invalid; and that, when afterwards a valid marriage was solemnized, the wife and the issue took the interests created by that settlement, notwithstanding the express declaration of the husband and wife, that they revoked the former deeds and all their provisions, and that they were acting on a totally new agreement. The same principle must apply to the money. Since the uses declared of the land by the instruments, which were executed upon the supposition that the parties were husband and wife in 1798, came into operation the moment that a valid marriage was solemnized between them, notwithstanding the deeds which were executed in the intervening time; it must be regarded as established, that the issue of the marriage, solemnized in 1802, are entitled to the benefit of the first settlement, with respect to the money as well as with respect to the land. The court of law has certified, that, under the deed and recovery of 1799, the Plaintiff *Frederica* takes an estate tail in remainder in the lands and hereditaments which had been her mother's; and her right in the stock, which was transferred, and in the money which was covenanted to be paid, by her father, must be regulated by the same settlement, of which the deeds, declaring the uses of her mother's lands, were only a part. It would indeed be a fraud on the wife, if the first settlement of the real estate

were

(a) 3 Taunt. 376.

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were to prevail over the second, and the second settlements of the personalty were to prevail over the first. The object, which the parties had in view in 1802, was to revoke the whole of the former arrangement; they proceeded on the supposition that the whole was void: they never intended to defeat one part of the arrangement, and to let another part stand; to hold the wife bound by the settlement of *her* property, and to release the husband from the settlement of *his*.

The 8000*l.* was transferred to trustees, in whose names it still remains; and trusts were declared for the issue of the marriage, that is, as established by the certificate of the Common Pleas, for the issue of the marriage solemnized in 1802; and the Plaintiff *Frederica*, being the sole surviving issue of that marriage, is entitled to the benefit of those trusts. *G. C. Braithwaite* and *Elizabeth Boughton* could no more revoke or annul those trusts, than they could revoke or annul the uses declared of the land. In order even to raise an argument in support of the effectual revocation of the trusts, they ought to have obtained a re-transfer of the fund.

The covenant of *G. C. Braithwaite* to pay the 29,900*l.* is a valid covenant at law; and the issue, who are entitled to the benefit of that covenant, are the issue of the marriage solemnized in 1802. The trustees have never released the covenantor from the obligation of his covenant; he could not have compelled them to release him; and they could not have released him without a breach of trust. In equity, a covenant is considered as a settlement; the party, who has entered into a covenant, must be considered as having performed it; and the question as to the 29,900*l.* is the same, as if the money had been actually paid to the trustees at the limited time.

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Suppose,

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Suppose, that, after the settlement was executed in 1798, the marriage had, from some casual misunderstanding, been retarded for a year or two, and had been solemnized after this interval of delay: could it have been argued, that the previous settlement did not come into operation as soon as the marriage took place? Or, suppose, that, all other circumstances remaining the same, these parties had married a second time in 1802 without any new settlement, would not the deeds of 1798 have been the instruments which bound the parties? If such would have been the case, it is clear that the children of the marriage, which was solemnized in 1802, are the children contemplated by the settlement of 1798; and they are entitled to all the benefits which it provides for them. Where, then, is the power in other parties to diminish or take away those benefits, or to vary the contract under which the title to them arises?


Mr. *O. Anderdon*, for the children of Mrs. *Robinson*, in the same interest with the Plaintiffs.

Mr. *Shadwell* and Mr. *Pemberton*, *contra*.

It may be true, that, if the parties had intermarried in 1802, without entering into a new contract, the settlement of 1798 would have continued to be binding; because the effect of their marrying without making a new settlement, would have amounted to a declaration, that they meant to adhere to the stipulations of the deeds of 1798, and to treat the old contract as still subsisting. But though the first contract would have prevailed in that state of things, it is not to be thence inferred, that it will in like manner prevail, when it has been expressly disavowed and repudiated by the parties.

The questions proposed to the Court of Common Pleas related merely to the legal estates in the lands;
 and

and all, that the Judges decided by their certificate, was, that the deeds of 1802 did not take certain legal estates out of the persons, in whom they became vested under the deeds by which the first settlement was carried into execution. The whole of the argument in the Common Pleas proceeded on the difference between a legal conveyance, on the one hand, and contract or covenant on the other. There is no difficulty in coming to the conclusion, that instruments executed by *A.* and *B.*, not in exercise of any power, cannot affect legal estates subsisting in other persons. But what has such a conclusion to do with the only question now before the Court, viz. whether, in equity, the first contract or the second contract is to prevail?

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In 1798, Mr. *Brathwaite* and Miss *Boughton* entered into a contract in contemplation of a marriage. After marriage, that contract could not have been varied; but what was there to hinder them from varying it before marriage? They might annul it *in toto* by not marrying at all: they might equally annul it by marrying on other terms. Till the parties were husband and wife, children could not be considered as having any interest in the contract; for till the marriage took place, the possibility of future children could not be contemplated. Every contract, made in contemplation of marriage, is inchoate, incomplete, and revocable, till the marriage actually takes place. It is not the settlement alone, but the settlement, with subsequent marriage on the conditions of the settlement, which makes the settlement binding on the parties, and gives the possible issue of the marriage indefeasable rights.

Mr. *Sugden*, in reply.

The question is not, whether it was competent to the parties entirely to rescind the contract, but whether it
 is

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is possible for them, after a marriage has taken place, and children have been born, to say, that the instruments, which are valid at law, shall not be binding on them. The questions before the Court of Common Pleas were these: — Was the conveyance, made in pursuance of the first contract, an operative conveyance, though the parties had declared that it should not be operative? — Was the marriage of 1802 the marriage contemplated by that conveyance? — Did the conveyance carry the lands to the issue of that marriage? The court of law determined, that the conveyance was operative, notwithstanding the declarations of the parties to the contrary; that the marriage celebrated in 1802 was the marriage contemplated by the settlement of 1798; and that it could not be predicated of the issue of that marriage, that they were not the issue, who were to take the lands. Where is the equity to take away the real estate from the issue to whom the law has given it? It is decided, that, at law, the marriage in 1802 is the marriage contemplated by the settlement of 1798 and the recovery deed which was executed in pursuance of it; and that it was not competent to the parties to destroy that settlement, except by not marrying at all. Here, therefore, is a settlement made, and a marriage solemnized, under circumstances in which the settlement is operative. How can the rights of the issue be affected by intervening arrangements made between the husband and the wife? The question must be the same in equity as at law.

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The LORD CHANCELLOR.


In *August* 1798, a settlement was executed in contemplation of a marriage between *George Charles Braithwaite* (afterwards *Sir George Charles Brathwaite Boughton*) and *Eliza Boughton*, who was then under twenty-one, whereby
it

It was agreed, that, when the lady attained her full age, her real estates should be conveyed to certain uses; and the husband, on his side, made a settlement of personal property, agreeing to transfer to the trustees of the settlement 8000*l.* 5 per cent. stock on the trusts therein mentioned, and entering into a covenant that, within eighteen months of the marriage, a further sum of 29,900*l.* should be paid to the same trustees on similar trusts. A few days after the execution of this settlement, the ceremony of marriage took place between the parties, with the consent of the persons who had been appointed the lady's guardians. The lady came of age; a recovery was suffered of her real estates, and a deed was executed declaring the uses of the recovery conformably to the previous settlement. Shortly afterwards, it was discovered that the mother of the lady had a husband living; and, as that husband had not assented, the marriage was found to be altogether void. Under these circumstances, the parties came to a new arrangement with respect to the property. They executed deeds, reciting that the former marriage, and the settlements, which had been made on that occasion, were null and void, and stating, that they were determined not to marry again on the terms contained in those settlements; and, for the purpose of removing all doubts, if they did intermarry again, they declared, in the most distinct terms, that they rescinded and annulled the former instruments. After this a new settlement of the property was made, and a valid marriage between the parties was solemnized, of which *Mrs. Robinson* is now the only living fruit.

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The material question in this cause relates to the personal property: and the decision of it depends on the power which the parties had to revoke the settlement of *August* 1798.

So

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So far as relates to the 29,900*l.*, the settlement of 1798 was merely a covenant on the part of the intended husband, that he would, within eighteen months of the marriage, pay that sum to trustees upon the trusts therein mentioned: and the question is, whether, no marriage having taken place, and the parties being of full age and under no disability, it was competent for them afterwards, by mutual agreement, to put an end to that contract. I am of opinion that they were at liberty to put an end to a covenant of that description, and that there is no principle of law or equity to prevent them from putting an end to it.

It was argued, that the certificate of the Judges of the Common Pleas in *Boughton v. Sandilands* (a) was adverse to this opinion; but the decision on the case sent to the Court of law appears to me to have nothing to do with the present question. Towards the conclusion of the second argument, the Lord Chief Justice made the following observations: (b) — “The cases cited for the Defendant are very strong to put the operation of a fine or recovery upon the will of the parties; and to guard against that it is, that all settlements are made to give the use to the settler until the marriage: if that intermediate use were not limited, the settlee might alien before the marriage. No argument has been raised from the cases of contracts for the sale of goods, for building houses, or the like. Such contracts, whether under seal or not under seal, if they proceed on a clear mistake on both sides, are void. Suppose a man and woman covenant to marry, both being married, but both understanding their husband and wife to be dead: would not that covenant be void? And here, if, instead
of

(a) 3 *Tunst.* 376.

(b) 3 *Tunst.* 368.

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of a conveyance having been actually made, the contract had still rested in covenant, Sir *G. Boughton* would never have had the estate: so that it all rests upon the difference between a covenant and an actual legal conveyance." If such was the principle of the decision of the Court of Common Pleas, it is perfectly clear that it can have no application to the question concerning the covenant for the payment of the 29,900*l*.

Another important consideration arises. The parties wished to put an end to the whole of the arrangement which had been made in *August* 1798 — to put an end to it with respect to the real property as well as the personal: and if it should turn out that they were mistaken as to their power to put an end to it with respect to the real property, it would seem hard to put an end to it as to the settlement of the personalty. It thus becomes necessary to consider the question with respect to the real estate.

The decision of the Common Pleas was a decision merely as to the legal consequences of the facts and instruments stated in the case which was sent to them for their opinion. But the question, submitted to the court of law, is wide of the question which is brought before this Court. At the period when the settlement of the lady's real estates was made, the parties considered that they were actually married; and it was in contemplation of that supposed actual state of things, that the settlement was completed. It turned out in the result, that they were mistaken; in fact, no marriage had been celebrated; and the whole proceeding was founded in misapprehension. Under such circumstances, this Court would not consider that the settlement ought to have effect. The judgment of the Court of Common Pleas was founded on the principle, that,
at

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at law, the estate actually passed by the conveyance; and, had the transaction still rested in covenant, even a court of law would have refused to give effect to the covenant. This Court has power to operate on the transaction, in a manner in which a court of law could not act: and it will not hold that a transaction, founded entirely on mistake and on the misapprehension of the parties, ought to be considered as binding upon them.

In this view of the matter, it becomes unnecessary to advert to the distinction between the covenant to pay the 29,900*l.* and the sum of stock which was actually transferred.

The consequence is, that the rights of *Mrs. Robinson* must be regulated by the second settlement.

1827.

ATTORNEY-GENERAL *v.* Lord HOTHAM.

May 23.
July.

THE facts of this case are fully stated in the report of the argument and decision on the original hearing of the cause before Sir *Thomas Plumer*. *

The Defendants appealed.

The LORD CHANCELLOR expressed his assent to the judgment of the Master of the Rolls; and he affirmed the decree, principally on the ground that the long possession of the lands by persons holding as lessees of the charity, was conclusive evidence of the title of the charity to the property; and that, the commissioners under the inclosure act having no jurisdiction to determine with respect to the title of the lands in question, their decision was a nullity.

Upon an information to set aside a lease for ninety-nine years of charity lands, the Defendants, the lessees, set up a title adverse to the lease: upon the merits, it was held, that there was no ground for the defence; but the Court was of opinion, that, if the merits had been otherwise, the Defendants were

estopped, and could not dispute the title, while they retained the possession.

A husbandry lease of charity lands for ninety-nine years, at an uniform rent, cannot be supported.

Where a tribunal determines in a matter not within its jurisdiction, the decision is a nullity.

1 *Turner & Russell*, 209.

1827.


June 13.

HINDE v. METCALFE.

Semble, An order of reference to the Master, on a petition presented under Lord Eldon's act, ought not to be made, except on a hearing in Court, and on the appearance of counsel upon the petition.

IN the course of the argument in this case, it was stated, that an order of reference, made on a petition under Lord Eldon's act *, had been drawn up as of course, the petition not having been in the paper of petitions, or heard in Court; and it was said that this had long been an usual practice.

The LORD CHANCELLOR expressed his opinion, that such a practice was altogether irregular; and that petitions under that act ought to be heard, and orders made upon them, only in Court, and upon the appearance of counsel.

* 7 G. 4. c. 45. repealing the 39 & 40 G. 3. c. 56.

1827.

LEO' v. LAMBERT.

June 23. 25.

THE Plaintiff had obtained a writ of *nec exeat regno*, upon an affidavit that the Defendant, who was a foreigner, had received a sum of between 800*l.* and 900*l.* for which he ought to have accounted to the Plaintiff, and had applied the same or the greater part of it to his own use.

A writ of *nec exeat regno* discharged with costs, where, upon the affidavit of the Plaintiff and the answer of the Defendant taken together, there was a strong *prima facie* case that nothing was due from the Defendant to the Plaintiff.

The Defendant, by his answer, admitted the receipt of the money, but stated that he had repaid part of it to the Plaintiff; that he had paid another part of it to one *Wright*, and had retained the residue; and he set forth an agreement between him and the Plaintiff (and which was not denied by the Plaintiff), under which he was authorized to pay to *Wright* the sum alleged to have been paid to him, and had a right to retain the sum which he admitted he had retained.

Mr. *Lynch* moved to discharge the writ, on the ground that there was sufficient reason to induce the Court to believe, that there was no equitable debt due from the Defendant to the Plaintiff.

Mr. *Ching*, *contra*, insisted, that, as the existence of the debt was sworn to by the Plaintiff, the Defendant ought not to be discharged on his own oath; and that the Court would not go into the items of account, by which the Defendant affected to exonerate himself from the liability, which attached upon him by the receipt of the money.

The LORD CHANCELLOR said, that he considered the agreement stated in the answer, and admitted by both

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parties, as affording so strong a *prima facie* case in favour of the Defendant, and a case which was not inconsistent with the allegations contained in the Plaintiff's affidavit, that the Defendant ought not to be held to bail.

The writ was ordered to be discharged *with costs*, upon producing an affidavit from *Wright* of his having received the sum, which the answer stated to have been paid to him.

ROLLS.

June 18.


RICKETS v. LADLEY.

Construction of a will as to the question, whether the proceeds of real estate were made the primary fund for the payment of certain legacies.

SARAH RICKETS devised to *John Ladley*, his heirs and assigns, all her freehold and copyhold estates; and she bequeathed to him, his executors, administrators, and assigns, all her leasehold and personal estate, upon trust, to sell the said messuages, tenements, lands, and hereditaments; and, as to the money to arise from the sale of the freeholds and copyholds, she gave the same to him, his executors and administrators, upon trust, to pay a legacy of 100*l.* to each of the children of *John Rickets* and *Stephen Rickets* who should be living at her decease.

The testatrix, without making any further disposition of the proceeds of the real estate, gave, after some specific bequests, a legacy of 20*l.* to *Elizabeth Davis*, and bequeathed all her personal estate, "after payment of my just debts, the legacies *hereinbefore* and *hereinafter* given, and funeral and incidental expenses," to *John Ladley* and *Hannah* his wife, upon trust for certain

certain residuary legatees. In the concluding part of the will, she appointed *John Ladley* and *Hannah* his wife her executor and executrix, and gave each of them a legacy of 50*l*.

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At the death of the testatrix, there were five children of *John Rickets* and *Stephen Rickets*.

The question was, whether the five legacies of 100*l*. were to be paid exclusively out of the produce of the freeholds and copyholds, or whether those legacies were charged on the personal, as well as the real, estate of the testatrix.

Mr. *Sugden* and Mr. *Purvis*, for the heir at law.

The testatrix gives her personal estate, “after payment of the legacies hereinbefore and hereinafter given.” She had given, in the previous part of her will, only the legacies to the children of *John* and *Stephen Rickets*, and one legacy of 20*l*.; and, in the subsequent clause, she gave no legacies, except the sum of 50*l*. to her executor and executrix respectively. When she speaks of “the legacies hereinbefore and hereinafter given,” she must be understood as referring to the general mass of her legacies; and the words can scarcely be satisfied by confining them to the inconsiderable bequests of 20*l*. and 50*l*.

Mr. *Pepys* and *Spence*, *contra*, cited *Hancox v. Abbey*. (a)

The MASTER of the ROLLS was of opinion that the words “the legacies hereinbefore and hereinafter given,”
 were

(a) 11 *Ves.* 179.

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were satisfied by the other bequests; and that the five legacies of 100*l.* were to be paid out of the produce of the freehold and copyhold estate.

“His Honor doth declare, the Plaintiff, as heir at law of *Sarah Rickets*, the testatrix in the pleadings named, is entitled to the money produced by sale of the freehold and copyhold estates in the bill mentioned, except so much thereof as will be sufficient to satisfy the legacies of 100*l.* bequeathed to each of the children of *Stephen Rickets* and *John Rickets*, who were living at the time of the decease of the testatrix: and, the executors of the testatrix having paid the several legacies out of the personal estate of the testatrix, His Honor doth declare, that they are entitled to receive out of the money produced by sale of the testatrix’s freehold and copyhold estates the sum of 500*l.*, &c.”

1827.

WATKINS v. FLANNAGAN.

ROLLS.
June 19.

FLANNAGAN was surety for the payment of an annuity granted by *Watkins*, and *Watkins* executed to him a bond of indemnity. A commission of bankrupt issued against *Watkins* in November 1812; he obtained his certificate in February 1813; and, in the following April, the annuitant proved the value and arrears of the annuity under the commission. At the same time *Flannagan* redeemed the annuity, and took an assignment of the debt proved; and, in June 1817, he commenced an action against *Watkins* on the bond of indemnity, and obtained judgment. * *Watkins* then filed his bill for an injunction.

A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity subsequent to the commission.

The case came first before Sir *John Leach*, as Vice-Chancellor, on a motion for an injunction to stay the Defendant from proceeding to execution on the judgment which he had recovered; and, on that occasion His Honor decided, that the Plaintiff had not any equity on which an injunction could be granted. The facts of the case, and the judgment of Sir *John Leach* upon the motion, are fully stated in the first volume of *Glyn and Jameson's Reports*, 199.

The Plaintiff then applied to the Lord Chancellor for an injunction; and no judgment had been ever given upon the motion. In the mean time, the cause was proceeded in, and was now brought on for hearing.

Mr. *Horne* and Mr. *Campbell*, for the Plaintiff.

Mr. *Rolfe*, contra.

The

* *Watkins v. Flannagan*, 3 Barn. & Ald. 136.

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The facts not being materially varied from what had appeared upon the motion for the injunction, the MASTER *of the Rolls* adhered to the judgment pronounced upon the motion, and dismissed the bill with costs. *

* The fifty-fifth section of the present bankrupt act, 6 G. 4. c. 16., enacts, that the grantee of an annuity shall not sue a collateral surety of a bankrupt grantor, till he shall have proved under the commission the value of the annuity and the arrears; and that such surety, on paying the amount so proved, shall be discharged from all claim in respect of the annuity, and shall stand in the place of the annuitant in respect of the proof. The clause then proceeds —

‘And the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity.’

In *Bell v. Bilton* (4 Bing. 615.), the Common Pleas held, that the first clause of the section, directing that the grantee shall not sue the surety, till he has proved under the commission, was retrospective, and applied to annuities granted before the 1st of September 1825, by persons who were declared bankrupts before that day.

If the same construction is to be extended to the other clauses of the section, it seems to follow that the cer-

tificate of *Watkins* ought, in 1827, to have been a discharge to him from all claims of *Flannagan*.

In *Bell v. Bilton* it appears from the pleadings, that the annuity had been paid up to March 1826; and the action was brought by the grantee against the surety for the two subsequent quarters. On the 1st of September 1825, therefore, or the day immediately preceding, the surety had no claim, demand, or remedy against the bankrupt in respect of the payments which were the subject of the action; and that circumstance might be a ground for contending, that the case did not come within the proviso of the 135th section of the 6 G. 4. c. 16. which declares, “That nothing herein contained shall affect or lessen any right, claim, or demand, which any person now has under any subsisting commission of bankrupt, or upon or against any bankrupt against whom any commission has or shall have issued, except as herein is specifically enacted.”

The fifty-sixth section also has been held to have a retrospective

rospective operation. In *Ex parte Grundy*, in the matter of *Russell*, the circumstances were these: *George Russell*, by indenture dated the 18th of *February* 1772, covenanted for the payment of 2000*l.*, in case his intended wife, or any issue of his body by her, should survive him. In 1803 a commission of bankrupt issued against him, under which he obtained his certificate, and dividends to the amount of twelve shillings in the pound had been paid to the creditors. In *February* 1825 he died, leaving issue; and there still remained funds distributable under the commission. The question was, whether, the contingency having happened on which the 2000*l.* became payable, the same was now provable as a debt under the commission.

The VICE-CHANCELLOR held, that it was not provable. His Honor observed, that admitting the authority of the decision in *Bell v. Bilton* (though there were some *dicta* in the judgment of which he could not but doubt), it did not apply to the present question, because the value of the annuity was provable before the 6 G. 4.; and therefore, in giving the fifty-fifth section

a retrospective operation, no new debt was made provable under the commission, so that there was no collision with the proviso in the 135th section. It was, he thought, going too far, to say, that every section in the new bankrupt act was to have a retrospective effect, except such sections as were expressed in words positively confining them to a prospective operation.

On appeal, the Lord Chancellor considered that *Bell v. Bilton* was an authority in point; and held, that the debt was provable.

Mr. *Montague* and Mr. *Merivale* were in support of the proof; Mr. *Russell*, *contra*.

In *Churchill v. Crease* (a), and *Terrington v. Hargreaves* (b), the eighty-second section of the 6 G. 4. has been held to be retrospective.

In *Biggs v. Fellows* (c), it seems to have been assumed by the Court of King's Bench, that the eighty-second section was not retrospective.

In *Ex parte Shepard* (d), *in re Shepard*, it was held that the 132d section was *not* retrospective.

(a) 5 *Bingh.* 177.
(b) 5 *Bingh.* 489.

(c) 8 *Barn. & Cress.* 402.
(d) 1 *Mont. & M'Arth.* 67.

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1829.
December.

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June 21.

RAWSTONE v. PARR.

Seemle, where the parties intended that a promissory note should be joint and several, but, through ignorance, it is expressed to be joint only, a court of equity will relieve as well against the surety, as against the principal.

But where a joint promissory note, signed "*J. and J. E. — J. P., surety,*" was given to a creditor of the firm of *J. and J. E.*, and *J. P.* died, *J. and J. E.* being both alive, one of whom afterwards became bankrupt, and the other insolvent: Held, that the promissory note could not be considered as several against *J. P.*, the surety.

BY the decree in this cause, it was referred to the Master to take an account of the debts of the testator *James Parr*.

Messrs. *Oldam* and Co. claimed before the Master to prove a debt due to them from the testator. The Master reported that, Messrs. *John* and *James Ewing*, being indebted to Messrs. *Oldam* and Co. in the sum of 487*l.* 14*s.* for goods sold to them, the latter had demanded payment; when the *Ewings*, being unable to pay, requested Messrs. *Oldam* and Co. to give them time; and, to induce them to do so, offered to secure the payment of the said sum of 487*l.* 14*s.* by the promissory note of themselves and the testator *James Parr*. Messrs. *Oldam* and Co. acceded to their proposal; whereupon *John* and *James Ewing*, and *James Parr*, as their surety, made, signed, and delivered to Messrs. *Oldam* and Co. a promissory note of the following tenor: —

" *Liverpool, June 1. 1820.*

" Eighteen months after date we promise to pay to Messrs. *Oldam* and Co. 487*l.* 14*s.*, with lawful interest from the 14th of *April* last till paid; for value received.

" *J. and J. EWING.*

" *JAMES PARR, surety.*"

The Master further found, that the testator *James Parr* died on the 6th of *July* 1820; that, on the 6th of *February* 1821, a commission of bankrupt issued against

against *John Ewing*; that his estate had since been conveyed and assigned to assignees, duly chosen under the commission; that *James Ewing* had left this country insolvent, having compounded with some of his creditors for 5s. in the pound, and that he now resided in the island of *Newfoundland*; that the whole of the sum, secured by the promissory note, remained due to Messrs. *Oldam* and Co.; and that they had offered to prove the said debt under the commission against *John Ewing*, for the benefit of the estate of the testator *James Parr*, after being fully paid 20s. in the pound.

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Under these circumstances the Master was of opinion, that Messrs. *Oldam* and Co. were not entitled to claim their debt against the estate of the testator, they not having, as he conceived, a remedy at law against his assets: and the Master, therefore, disallowed their claim.

Messrs. *Oldam* and Co. were permitted to except to the report; and the exception now came on to be argued.

Mr. *Bickersteth*, in support of the exception.

The question is, whether the Court can infer from the circumstances under which the note was given, that it was the intention of all who joined in it, that it should be several as well as joint, and that it was drawn in its present form only from the ignorance or negligence of those who prepared it. *Parr* describes himself on the face of the instrument as a surety; and the intention must have been, that he should be bound as sureties usually are bound, namely, to pay the debt, if the principal debtor did not pay it. The Court has often held,
 that

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that instruments, which in their form were joint, should operate as if they were both joint and several. *Bishop v. Church* (a), *Thomas v. Frazer* (b), *Burn v Burn* (c). In none of the cases of this class was there evidence of a special agreement that the security should be joint and several; but it was inferred, from the nature of the transaction, that the intention of the parties was, that each should be bound severally.

Mr. *Pemberton*, for the Plaintiff.

This promissory note is the joint security of three persons: two of these persons are still alive; *Parr* is dead; there is, therefore, no legal demand, in respect of this note, against his assets; and there is no ground for carrying his liability beyond the extent of his legal obligation. In the cases in which a joint instrument has been held to bind the parties severally, there has been evidence or admission, that the intention of the parties was, that each should be bound severally. In *Bishop v. Church* the condition of the bond was several, and each of the obligors participated in the consideration for which the bond was given. In *Thomas v. Frazer* the bond was given for the debt of both the obligors; and the defendant admitted the material allegations in the plaintiff's bill. In *Burn v. Burn* there was clear evidence of the intention of the parties, that each of the parties should be severally bound. Here there is not the slightest evidence to shew, that it was ever intended that the note should be other than it is.

Besides, *Parr* was only surety, and received no benefit from the transaction; and there is, therefore, no ground for extending the obligation.

Is

(a) 2 *Ves.* sen. 100. 371. (b) 3 *Ves.* 399. (c) 3 *Ves.* 573.

Is there a single case in which it has been decided, that, as against a surety, an instrument, which is in its form joint, shall be held to be several?

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Mr. *Roupell* and Mr. *Spence*, for other parties in the same interest.

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It is apparent, from the nature of this transaction, that the promissory note was drawn in the form of a joint security merely from the ignorance of the parties; and that the real intention was, that the testator *James Parr*, as surety, should severally pay the debt, on the default of the *Ewings*. The case is the same, in principle, as if the security were a joint bond, where the intention was, that the bond should be joint and several; and there is no reason why a court of equity should not relieve from such a mistake, as well against the surety as against the principal.

Exception allowed.

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On appeal *, the judgment was reversed, and the exception overruled.

1830.
 Feb. 9. 11.

* See *infra*.

1827.

ROLLS.

June 22. 25.

GROVER v. HUGELL.

A person who has entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land-tax, is not bound to complete his purchase, when it appears that, upon the prior sale for the redemption of the land-tax, the rector was himself the actual purchaser, in the name of his curate.

IN *December* 1804, part of the glebe lands of a rectory were sold for the redemption of land-tax. The curate was the nominal purchaser, and the conveyance was made to him in due form; but, upon the evidence in the cause, there was reason to believe that the rector himself was the purchaser in the name of his curate, as a trustee for him.

In *July* 1824, after the death of the rector, the Defendants, who were trustees under his will, entered into a contract for the re-sale of the lands to the Plaintiff. It appeared, upon the abstract of title which was delivered to the Plaintiff, that the curate, who was the apparent purchaser, and had the conveyance made to him in *December* 1804, had, in the month of *June* in the following year, conveyed the lands to the rector for the identical sum at which he had purchased; and, this circumstance creating suspicion, the Plaintiff made inquiries which led to the discovery of other facts, which raised a reasonable presumption that the rector had been originally the actual purchaser.

The Plaintiff having objected to the title on this ground, and having refused to complete his contract, the trustees brought an action against him, in which he suffered judgment by default; a writ of inquiry was afterwards executed against him, and damages were assessed by a jury. The Plaintiff then filed the present bill, praying that an injunction might issue, to stay execution at law; that the contract for sale might be delivered

ered up to be cancelled; that the Plaintiff's deposit might be returned to him with interest; and that he might be paid his costs at law as well as in equity.

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It was proved in evidence, that the expense of the conveyance from the commissioners was charged by the solicitor, who prepared it, not to the curate, but to the rector. From this circumstance, along with the other features of the transaction, the Master of the Rolls was of opinion, that there was so much reason to believe that the rector was originally the actual purchaser, that, for the purposes of the present suit, the fact must be presumed to be so.

Mr. Horne and Mr. Barber, for the Plaintiff.

Though the rector acquired a valid legal title to the lands, under the conveyance to the curate, and the conveyance from the curate to him, the original purchase, if it were actually made by the curate as a trustee for the rector, could not be sustained in a court of equity; because it would be in the nature of a purchase of a trust property by a person who was himself a trustee for sale. The land has now been sold for nearly thrice the price for which it was bought in 1804. Why may not the present incumbent file his bill, claiming a lien on the lands for the difference between their actual value and the price at which they were sold, and to have the amount of that difference invested for the benefit of him and his successors? The title, therefore, being defective in the view of a court of equity, though not in the view of a court of law, the Plaintiff ought to have the relief he prays.

Mr Sugden and Mr. Wakefield, contra.

The objection to the title has so little substance, either in fact or in law, that the Plaintiff ought to be left to the result

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result of legal remedies. The purchase-money was paid by the curate, and the conveyance was executed to him; it would be impossible to prove that he was not the *bonâ fide* purchaser; and, after twenty years' possession, who is there that would dare impeach the title on so vague a speculation? The Plaintiff, if he had completed his contract, would have been a purchaser for valuable consideration without notice; and the circumstance of its appearing on the abstract, that the property had been purchased by the curate, and afterwards sold by him to the rector, could never have been notice to him, that the rector was (if in fact he was) the original purchaser. A title is not to be deemed defective, because conjectural suspicion may be thrown upon it; especially, when that suspicion is created by the unnecessary scruples of a party, who wishes to escape from his contract.

Even if the rector were in reality the original purchaser, what clause is there in the act which forbids him to purchase? * In *Horward v. Ducane* (a), Lord Eldon held, that trustees, who had a power of sale or exchange, with the approbation of the tenant for life, might sell to, or exchange with, the tenant for life himself; and in such a case, the tenant for life stands in a relation to the property and to the person in remainder, very analogous to that of the incumbent in the transaction which is supposed to have taken place here. The sale was by commissioners appointed by the crown, and must have been conducted in the manner prescribed by the act; and two of the commissioners must have been parties to the conveyance †; so that it is impossible to suppose,

(a) 1 *Turner & Russell*, 81.

* 42 G. 3. c. 116

† 42 G. 3. c. 116. s. 69. 72, 73, 74. 76.

suppose, that the incumbent, in becoming the purchaser, could gain any unfair advantage. It would, therefore, have been no objection to the title, if the rector had been, from the first, the real purchaser.

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If there were any validity in the objection taken by the Plaintiff, he might have had the full benefit of it in the action at law. In an action upon a contract for the purchase of an estate, a court of law will notice a purely equitable objection to the title. *Elliott v. Edwards* (a), *Maberley v. Robins*. (b) “If the contract,” says Lord Chief Justice Gibbs (c), “be a contract to make a good title both in law and in equity, and the contract is brought before this Court, we must collaterally look to see whether the title be good in equity as well as in law; it is true, we sit here only as a court of law to administer the legal rights which arise out of the contract; but one of those rights is to have a title good in equity.” The whole matter, therefore, which is put in issue by this suit, might have been tried in the action; and the Plaintiff must be bound by the result of the action.

This is a bill to have a contract rescinded and delivered up, which, according to the case alleged by the Plaintiff, is void at law. A court of equity does not exercise so useless a jurisdiction, as to pronounce a decree, directing an instrument, which is in itself a nullity, to be delivered up or cancelled.

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It is not necessary to decide, whether a bill in equity will or will not lie, to have a contract for purchase delivered up, where a good title cannot be made; be-
cause

(a) 3 Bos. & Pul. 181.

(b) 5 Taun. 625.

(c) 5 Taun. 627.

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cause here the bill has other objects, — the injunction to stay execution at law, and the repayment of the deposit. It is fit to observe, however, that the general principle of a court of equity is, that a bill in equity may be filed for the delivery up of an instrument which cannot be enforced at law, in order that the Plaintiff may not be harassed by vexatious proceedings at law.

I am of opinion that the equitable objection here could not have been taken advantage of at law; and that, at law, the conveyance by the commissioners would have been held to confer a good title, and would have maintained the action. The general rule in equity is, that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was, to obtain the best possible price for the land sold; and his interest as purchaser was, to pay the least possible price for it. It is no answer to say, that the superintendence of the commissioners would secure a full price. The sale is to be by public auction, and before two of the commissioners, or some person appointed by them; and their approbation of the sale is required by the act. But still the duty of the rector was to give his aid to the procuring of the best possible price. The case of *Howard v. Ducane*, where it was held that trustees for sale, with the approbation of the tenant for life, may sell to the tenant for life, does not furnish a general principle, but is an exception to a general principle. Lord *Eldon* expressly put the case upon the practice of conveyancers, which he did not think it safe to unsettle; and states, that he should have said originally, it would not do.

Let the contract in question be delivered up to the Plaintiff to be cancelled, and let his deposit be returned to him. I will not give the Plaintiff his costs at law,
because

because they were chiefly incurred by his own negligence. He ought to have filed his bill in equity as soon as the action was commenced against him. But let the Defendants pay to the Plaintiff his costs in equity.

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v.
HUGELL.

HINCKSMAN v. SMITH.

SMITH v. HINCKSMAN.

ROLLS.

June 28.
July 2. 6.

THE bill was filed by a purchaser for the specific performance of a contract, by which the Defendant had agreed to sell a certain estate, to which he was entitled in fee, subject to the life interest of a person who was eighty-three years of age, for the sum of 800*l*. The purchase-money was to be paid upon the death of the tenant for life; but, the object of the Defendant in the sale being to assist a relation with a loan, it was part of the agreement, that a sum of 200*l*. should be advanced by the Plaintiff to the Defendant upon the execution of the contract, the Defendant paying interest for it during the life of the tenant for life of the estate.

The rule, that the purchaser of a reversion must prove that he gave a full price, has so long been considered as settled, that it can be altered only by the court of appeal.

The Defendant, at the time of the contract, had just attained his age of twenty-one years. With a view to the treaty with the Plaintiff, he had gone over the estate with his grandfather, the relation to whom he was to advance the 200*l*., on the day he entered into the agreement: but it appeared upon the evidence of the solicitor, who was employed by the Plaintiff, and acted for both parties in drawing the contract, that the Defendant, at the time it was prepared, seemed to have little knowledge of the property, and especially, that, being asked by the solicitor as to the number of acres of

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which the estate consisted, he professed his ignorance in that respect. Upon the representation of the Plaintiff, it was stated in the contract, that the land, which was the subject of the sale, consisted of thirty-five acres or thereabouts; whereas, upon a subsequent admeasurement, it was found to consist of forty-seven acres. The Plaintiff was the proprietor and occupier of land adjoining to the estate contracted for.

It appeared upon the evidence of the Plaintiff's own witnesses, that, at the time of the contract, the Defendant's reversion was worth upwards of 1000*l.*, and the Defendant's witnesses estimated it at a higher value.

Mr. *Sugden* and Mr. *Girdlestone*, for the Plaintiff, contended, that the rule laid down by Sir *William Grant* in *Gowland v. De Faria* (a) — that the purchaser of a reversion was bound to shew that he had given the full value for it — could not be considered as the settled law of the Court, after the remarks which Lord *Eldon* had made on it in the case of *Whalley v. Whalley* (b), and that it had been further discredited by observations both from Lord *Eldon* and Lord *Redesdale*, in a subsequent case in the House of Lords. In *Skelly v. Nash* (c), a bill to set aside a sale of a reversion, which had been disposed of by public auction, was dismissed with costs, though it was shewn that the full value was not given by the purchaser.

Mr. *Pepys* and Mr. *Garratt*, for the Defendant, denied, that there had been any decision in the least impeaching the authority of *Gowland v. De Faria*; or that either Lord *Eldon* or Lord *Redesdale* had ever questioned the principle

(a) 17 *Ves.* 20. (b) 1 *Meriv.* 436. 3 *Blygh*, 1. (c) 3 *Mad.* 232.

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principle of that case. Doubts might have been sometimes expressed as to the wisdom and policy of the principle on which the Court had dealt with sales of reversionary interests; but it was beyond controversy, that the rule there laid down was the established law of the Court. *Davis v. The Duke of Marlborough*, (a) The case of *Shelly v. Nash* proceeded expressly on the distinction between a sale by auction and a sale by private contract.

The MASTER of the ROLLS.

July 6.

In *Goeland v. De Faria*, Sir William Grant did not consider himself as laying down a new rule, but as following the current of authority (b); and, since that case, the rule has so far been regarded as the settled law of the Court, that, although I have, upon more than one occasion, judicially questioned both the principle and policy of the rule, yet it would not become this Court to make a precedent in direct opposition to it.

It may be observed, that, independently of this rule, there are objections to the Plaintiff's bill for the specific performance of this contract. It is clear that the Defendant, a young man just of age, knew but little of this estate, and was altogether ignorant of the quantity of the land; but, the Plaintiff being the proprietor and occupier of land adjoining, it is difficult to presume that he was equally ignorant: yet it was upon the information of the Plaintiff that the solicitor, who drew the agreement, inserted the quantity as containing thirty-five acres or thereabouts, and the Defendant must have executed the contract under the impression, that such only was the

(a) 2 *Swanston*, 139.

(b) See the cases collected in 2 *Swanston*, 139—143. note.

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 v.
 SMITH.

the quantity which he agreed to sell for 800*l.*, when, in fact, the actual quantity was forty-seven acres.

The bill was dismissed.

The Defendant had filed a cross bill, praying that the agreement might be delivered up to be cancelled; and the Court ordered the delivery of the agreement accordingly, but gave no costs in either of the suits. (*a*)

(*a*) *Wood v. Abrey*, 3 *Mad.* 424.

ROLLS.

June 26.

EMANUEL v. CONSTABLE.


The statute of the 25 *G. 2.* c. 6. does not extend to wills of personal estate only; and a legacy to a person, who is an attesting witness to such a will, is not void.

THIS was a suit for the administration of the property of a testator, who made a will of personal estate only; and the question in the cause was, whether a pecuniary legacy to a person, who was a witness to the will, was or was not void under the 25 *G. 2.* c. 6.?

Mr. *Sugden* and Mr. *Phillimore* contended, that the legacy was void. The act, they said, declares, (*b*) “that, if any person shall attest the execution of any will or codicil, which shall be made after the 24th day of *June* 1752, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any

(*b*) *s. 1.*

any person claiming under him, be utterly null and void." What more general words could the legislature have used, if it had been their intention to make the act apply to personalty as well as to wills of real estate? The language of the enacting clause, where it is direct and unambiguous, cannot be controlled by the preamble, and still less by the title of the act. The mischief, which was to be guarded against, had been most prominent in the case of wills of real estate; but it was intended, that the remedy should be general.

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The very point came before Sir *William Grant* in *Lees v. Summersgill* (a); and he held that the 25 G. 2. c. 6. extended to all wills, and, therefore, that a legacy, given by a will of mere personalty to a person who was a subscribing witness, was void. The reasons assigned in his judgment are unanswerable; the judgment itself has been for many years before the world; its authority has never yet been questioned in this Court; and never, till within a few months, has it been questioned any where.

In a late case, indeed, of *Brett v. Brett* *, decided in the Arches Court of *Canterbury*, on the 24th of *July* 1826, the contrary doctrine was held by Sir *John Nicholl*; and, on appeal, his judgment has been recently confirmed by the Delegates. It must, therefore, be admitted,

(a) 17 *Ves.* 508.

* The judgment of Sir *John Nicholl* in this case has been since reported in 3 *Addams*, 210. It was affirmed by the Delegates on the 27th of *May* 1827. The Judges Delegate, by whom the decision was affirmed, were Baron *Graham*, Justices *Bayley* and *James Allan Park*, and Doctors *Phillimore*, *Lushington*, *Dodson*, *Blake*, *Haggard*, and *Salisbury*.

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mitted, that there is a conflict of authority. But, on a question on the exposition of an act of parliament, the deliberate judgment of Sir *William Grant* pronounced in 1811, and, for fifteen years, never once questioned, ought to have more weight than the decision of an ecclesiastical court.

Mr. *Bickersteth* and Mr. *Flather*, *contra*, were not called upon to argue in support of the claim of the legatee.

The MASTER of the ROLLS.

In the conflict of great authorities, it may seem to be desirable, that this important question should be settled by the supreme court of appeal.

I agree that the preamble of a statute cannot controul a clear and express enactment: but the plain intent of the legislature is expressed in the preamble, and the nature of the mischief, which is sought to be remedied, may serve to give a definite and qualified meaning to indefinite and general terms. The preamble of the 25 G. 2. c. 6., after reciting the provision in the statute of frauds, which requires that all devises of lands should be attested and subscribed in the presence of the devisor by three or four credible witnesses, and declaring that it had been found to be a wise and good provision, but that doubts had arisen who were to be deemed legal witnesses within the intent of the said act, proceeds to enact, “that, if any person shall attest the execution of any will or codicil, which shall be made after the time therein mentioned, to whom any beneficial devise, legacy, or gift, shall be made of real or personal estate, such devise, legacy, or gift, shall, so far as regards such person, be utterly null
and

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and void ; and such person shall be admitted as a witness to such will or codicil." The avowed purpose of this statute, therefore, is, to remove doubts which had arisen with respect to the persons who were to be deemed good witnesses within the intent of the statute of frauds, which required three or four witnesses to a will of lands; and the mischief to be avoided was, the admission of witnesses to such a will, who were interested to support the will. When this statute, therefore, proceeds to enact, "that, if any person shall attest the execution of any will or codicil, who shall have a gift by the will or codicil, such gift shall be void," it is a reasonable construction to say, that the legislature must be understood here to be speaking of *such* wills or codicils as by the statute of frauds require to be attested by witnesses; and the indefinite words "any will or codicil," may reasonably be read "any such will or codicil," unless it should appear from other parts of the statute, that the legislature intended to give the words "any will or codicil" their most extended and indefinite meaning. It seems to me, upon a careful perusal of the whole statute, that, except these words, "any will or codicil," which are necessarily often repeated in the course of the enactments, there is not a single word in the statute, which supports the notion, that these words were meant to be used in their indefinite sense: and, on the contrary, that most clauses in the statute, and especially the second, third, eighth, ninth, and tenth sections, strongly confirm the inference, that the words "any will or codicil," throughout the statute, are to be read "any *such* will or codicil."

It is further to be observed, that, wills of personal estate being good without the attestation of any witnesses, it was not necessary to extend to wills of personal estate that protection which it was the object of the legislature to

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to give by this statute to wills of lands, by the exclusion of interested witnesses.

Upon the whole, I am not able to concur with the great authority in this Court, which has been referred to; but, in conformity with the decision of Sir *John Nicholl* and the court of delegates, I declare, that the 25 G. 2. c. 6., does not extend to wills of personal estate, and that the legacy in question is not null and void, by reason that the legatee was an attesting witness to the will.

REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY.

WINCHILSEA *v.* WAUCHOPE.

TOD *v.* WINCHILSEA.

ROLLS.

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July 7. 9.

1829.
January.
June.
July.

THE bill was filed by persons claiming through the co-heiresses of *John Duke of Roxburgh* against Defendants, who took under his will. The only question in the cause was, Whether the will was attested according to the statute of frauds? and that question depended on this, Whether the subscribing witnesses signed their names in the presence of the testator?

Circumstances under which a new trial of an issue of *devisavit vel non* will be directed.

A third trial of an issue of *devisavit vel non* directed, after two juries had found in favour of the will.


Quære, Whether, in a question between a devisee and an heir-at-law, the Court will bind the inheritance by the result of one trial.

The attestation and conclusion of the will were in the following words: — “ In witness whereof, this and the preceding page of stamped paper are written by the said *James Dundas* at my desire, and subscribed by me at *London* this 19th day of *March* 1804, before three witnesses, *Coutts Trotter*, Esq., banker in *London*, and *John Battiste*, my servant, and *William Winter*, apothecary in *London*, the day of signing being the 19th day of

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March and year aforesaid, and this attestation of the date being written by the said *James Dundas*.

(Signed)

“ ROXBURGH (L. S.)

“ Signed, sealed, published, and declared in the presence of

“ COUTTS TROTTER,

“ WILLIAM WINTER,

“ JOHN BATTISTE.”

The circumstances connected with the execution of the will, and the material parts of the evidence, are stated in the two successive judgments of the MASTER of the ROLLS.

On the 17th of *April* 1826, an issue of *devisavit vel non* was directed to be tried in the Court of King's Bench ; and, on the 14th of *December* in the same year, the jury found a verdict in favour of the will.

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 July 7.

A motion was now made for a new trial.

Mr. *Horne*, Mr. *Pemberton*, and Mr. *Stuart*, in support of the motion.

July 9.

Mr. *Sugden* and Mr. *Jacob*, *contra*.

The MASTER of the ROLLS.

In this case an application is made for the new trial of an issue to determine the validity of a will made by *John* late Duke of *Roxburgh* on the 19th of *March* 1804, being the day before his death, and when he was in a most debilitated and dying state. The only fact in dispute is, Whether the will was attested by the subscribing witnesses in the presence of the testator, according to the statute of frauds.

The learned Judge, who presided at the trial at law, most correctly stated to the jury, that the only question was,

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was, whether the will was or was not attested by the witnesses in such a place, that the testator might have seen what the witnesses were doing; and the jury thought fit to come to a conclusion in favour of the will. The learned Judge has not stated, whether he was satisfied or dissatisfied with the verdict; but there are plainly, in his summing up, indications, that he considered it probable that the jury might have come to a different conclusion. The question here is not, however, whether a court of law would or would not have directed a new trial in this case; but whether, upon the whole, the conscience of the Court is satisfied; or, in other words, whether the conclusion of the jury is the same as the Court itself would have come to upon the evidence in the cause.

There are some facts which are not in dispute. It is certain that the will was not executed in the room where the duke lay, but in a room adjoining. It is certain that the door of communication was open between the two rooms, and that a line, drawn from the left side of the duke's bed, and through the door of communication between the two rooms, close to the south side of that door, to the east side of the adjoining room, would have comprised a space of the adjoining room, extending about four feet southward from the windows, and, consequently, that, if the will was attested at any part of the adjoining room within about four feet south of the windows, it was attested in a place in which the duke might have seen what the witnesses were doing. The question, therefore, becomes narrowed to this, — Can this Court be fully satisfied, that the will was attested in any part of the adjoining room within four feet south of the windows?

It appears that, in the adjoining room, and between the windows, there was a commode or pier table, about

G g 2

four

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four feet long, and twenty-two inches wide; and there were also in the adjoining room two other tables, one a Pembroke table, and the other a large circular writing table upon casters, about five feet in diameter, which usually stood in the centre of the room. The Duke, therefore, might have seen the witnesses in the act of attesting the will, if they had attested it on the commode or pier table standing between the windows, or if either of the other two tables had been moved towards the windows so as to stand within the space of four feet south of the windows. Generally speaking, where a will is attested in an adjoining room, if there be a particular part of the room in which the testator might have seen the attestation, and if there be an absence of all evidence, or if there be doubtful evidence as to the particular part of the room in which the attestation actually took place, it would be reasonable to presume that it did take place where it ought to have taken place; because it would be reasonable to presume, that the professional person present knew the law as to the attestation of wills, and would take care to observe the proper forms. But such presumption is repelled in the present case; because the professional person employed seems to have been a stranger to the law of *England* in this respect, and the witnesses themselves did not know, and were not apprised, that it was at all material in what part of the adjoining room the will was attested. Sir *Coutts Trotter* says, "I think there was a writing table in the room, and that we signed upon it;" and this is the only direct evidence upon the subject. In the absence of all direct evidence, the presumption would be, that the witnesses, ignorant that the part of the room was material, would write upon the writing table, where it must be inferred that the writing materials were to be found, and where it is probable the candles would be placed.

If

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If it be taken that the will was attested upon the writing table, then the remaining question would be, Whether it is to be presumed that the writing table, which was of large size, was shifted from its usual situation in the middle of the room? But upon what can such presumption be founded? Why should the table be moved without a purpose? And what purpose could there be in moving it, the witnesses being ignorant that the position of the table was material? Under these circumstances, therefore, to conclude, as the jury must have done, that the will was executed upon the pier table, or that the writing table was removed to within four feet of the windows, is to come to a conclusion against the only direct evidence in the cause, and against all reasonable presumption.

It is proper that I should add, that this being a case, in which, but for the necessity of the interference of this Court*, the heir at law would, of course, have been entitled to take the successive opinions of juries by new ejectments, this Court is not in the habit of binding the inheritance by a single trial. In the case of *Lord Darlington v. Bowes*, before Lord *Northington* (a), Lord *Northington* states, upon a motion made before him for a new trial, that he would have refused it, if a single precedent could be found, in which the Court had bound the inheritance by one trial only; but, no such precedent being found, he granted the new trial. I am not aware that a precedent to that effect has since been made.

In

(a) 1 *Eden*, 270.

* The property had been sold money had been invested, upon by an arrangement between the trust, for the persons who should claimants: and the purchase- be found ultimately entitled.

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In this case, however, I grant the new trial upon the merits of the case, and without laying any stress upon the absence of Mr. *Dundas*. That he was not called in support of the will affords the unavoidable presumption, that he had no testimony to give favourable to the will; and, upon the evidence which was before the jury, I am not satisfied with their verdict.

On the 3d of *November* 1828 the cause was again tried; and a verdict was a second time given in favour of the will.

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Jan.

Those who claimed through the Duke's co-heiresses then moved for a third trial; and on that occasion the MASTER of the ROLLS pronounced the following judgment: —

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Feb. 3.

This is an application for a new trial of an issue *devisavit vel non*, after two trials at law already had, and two verdicts found in support of the will. The objection made to the will is, that it was not attested in the presence of the testator.

If, in this case, I were to confine my attention to the report of the Judge who presided at the trial, I must, necessarily, refuse the application. It appears by that report, that, in support of the will, the testimony of four witnesses was relied upon. Mr. *Winter*, one of the witnesses, attested the execution of the will. He is now dead, and his deposition in the ecclesiastical court, in a suit considered to be between the same parties, was read. Mr. *Winter* deposes that the will was attested in the Duke's bed-room, and, consequently, in his presence. Another witness was *Battiste*, an old servant of the Duke's, who also attested the execution of the will. An affidavit was made by
a sur-

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a surgeon that *Battiste* was too ill to attend the trial, and a deposition made by him in the Court of Chancery was read. He there deposes, that, to the best of his belief, the witnesses attested the will in the same room in which the duke signed it, that is to say, in the bed-room. Sir *Coutts Trotter*, who also attested the execution of the will, was a third witness, and was examined *vivâ voce*. The effect of his evidence is, that he could not say with certainty, but that the strong impression on his mind was, that the witnesses attested the will in the adjoining room.

The fourth material witness was a person who produced a plan of the duke's bed-room and the adjoining room, for the purpose of proving that, if the door between these two rooms was open, which seems to be admitted, there was a space in the adjoining room, where, if the will had been attested, it would have been, on settled principles, an attestation in the presence of the duke.

No evidence was given on the part of the Defendants; and, — considering that two of the attesting witnesses swear positively that the will was attested in the bed-room, and that the third attesting witness only says, that he cannot say with certainty, but that his impression is, that it was executed in the adjoining room, — it seems the natural inference, that the jury must have yielded to the weight of evidence, and have been of opinion, that the will was actually attested in the bed-room, and, therefore, in the presence of the duke: and, if my attention were to be confined to the Judge's report, I could not possibly find there any reason for disturbing the verdict.

My opinion, however, is, that, the assistance of the jury being only one of the means by which the con-

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science of the Court is to be informed, it is the bounden duty of the Court, before it comes to its decision, to consider all the means by which the conscience of the Court may be informed, and to give its deliberate attention to all the evidence which is judicially before it.

Before I enter into the consideration of the evidence, I must premise that the applicant here has some reason to complain of surprise, from the manner in which the last trial was conducted.

It is true that the leading counsel in support of the will did, upon the first trial, open his case as an attestation in presence of the duke, either in the bed-room or in the adjoining room; but, in his reply, he seems to have lost sight of any attestation in the bed-room, and to have relied upon such an attestation in the adjoining room as would have amounted to an attestation in the presence of the Duke: and the former argument before me, upon the application for a second trial, proceeded altogether on the question — in what part of the adjoining room the attestation was had? — and, not being satisfied that the attestation could have taken place in any part of the adjoining room, in which by possibility the Duke could see the witnesses, I found it my duty to direct a second trial. Under these circumstances, the Defendants to the issue might reasonably expect, that the same point as to the part of the adjoining room, in which the will was attested, would be the question between the parties upon a new trial, and not that the Defendants would desert that case, and rely, as they seem to have done, upon an attestation in the bed-room.

Assuming for the present that the jury founded their verdict upon an attestation in the bed-room, I come now to the consideration, whether, upon all the materials which

which are judicially before me, I can possibly adopt that conclusion.

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In the ecclesiastical court, Mr. *Winter* deposed that the attestation was had in the Duke's bed-room, and on a table moved near to his bed.


In the ecclesiastical court, *Battiste* deposed that the will was attested in the adjoining room.

Upon a commission from the Court of Chancery in this cause, Mr. *Dundas*, a writer to the signet, who wrote the will, deposed, that he believed that the witnesses attested in the adjoining room; and he uses this strong expression, that he was sure that none of the witnesses attested the will in the Duke's bed-room.

On his examination in Chancery in chief, Sir *Coutts Trotter* says, he believes, and has no doubt there was a writing table in the adjoining room, and that he, the deponent, and the witnesses signed at the table; but that he cannot speak as to the exact size of it. On his cross-examination, Sir *Coutts Trotter* says, that the deponent and the other witnesses retired into the adjoining room and attested upon a table, and that he was not aware that the place of attestation was material, and that he placed himself in that part of the room which appeared most convenient for the purpose of signing his name.

Upon his examination in Chancery, *Battiste*, to whose examination in the ecclesiastical court I have before adverted, deposes, that the witnesses attested in the bed-room.

Considering the testimony as to the attestation in the adjoining room, given by Mr. *Dundas* and Sir *Coutts Trotter*,

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Trotter, is it possible that my conscience can be satisfied with a verdict which seems to affirm an attestation in the bed-room?—and especially when it is considered, that *Winter* and *Battiste* are the only witnesses who speak of the bed-room, and that, when *Battiste* was examined in the ecclesiastical court, about twenty years before he was examined in Chancery, and two years only after the fact, and when his memory must have been fresh, he deposed the other way, that the attestation took place in the adjoining room; and that, as to Mr. *Winter*, a witness of the name of *Garraty*, who was examined in Chancery, deposes, that, about the time of the transaction, he conversed with *Winter* upon the subject of the Duke's will, and repeatedly heard him declare, that the attestation was in the adjoining room.

If, therefore, I am to assume that the jury proceeded upon a supposed attestation in the bed-room, it is not a conclusion which, upon the whole case before me, I can possibly adopt and act upon.

If, upon the other hand, I am to assume, upon the loose evidence of Sir *Coutts Trotter*, that the jury proceeded upon the ground of an attestation in the adjoining room, so as to be constructively in the presence of the Duke, then there is a want of evidence to support the verdict. The plan produced manifests, that, in order to be attested in the adjoining room in the presence of the Duke, it must have been attested within the space of five feet from the windows, the room being twenty-one feet nine inches long from those windows, and three fourths of the room being therefore out of the Duke's presence; and the circumstances of the case do not permit me to say, that the will, if attested in that room, must be presumed to have been attested in the proper part of that room, because Sir *Coutts Trotter* says, that he was not informed that the place of attestation was material, and that he looked
 out

out only for the most convenient place for the purpose of signing his name.

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&

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It is said that no further information can be given on the subject, and, therefore, it would be useless to direct a new trial. It may be true that no further information can be given upon the subject; but the whole case may be a second time submitted to a jury, nearly as it seems to have been upon the first trial, and which was in truth my purpose and expectation.

The policy of the law, which requires the attestation to be in the presence of the testator, may not be obvious to a jury, and the question may be thereby prejudiced; and it was for that reason that, if the parties would have consented, or any precedent could have been produced, I would have taken upon myself the decision of the question, without giving further trouble to a jury. The case is now, I think, reduced to this mere question of presumption, — whether the will, being attested in the adjoining room, which was called the writing room, and was provided with a large round table in the middle of it, upon which it is to be inferred that Mr. Dundas had, immediately before, written the will from the instructions of the Duke, was attested on that round table, remaining in its usual place, or upon a moveable *Pembroke* table, removed to the presence of the duke, or upon a pier table or commode about two feet wide, upon which Mr. Dundas says papers were laid, it being admitted that the witnesses were ignorant that the place of attestation was material.

This is a case which more especially requires the direction of a Judge for the assistance of the jury; and they will doubtless receive it. Upon the whole, therefore, let a new trial be had; and, considering the pressure

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sure of business upon the Court of King's Bench, and that the learned Lord who presides in that Court has twice been troubled with this case, let the new trial be had in the Court of Common Pleas.

June 1. 19. 25.
 July 20.

The parties claiming under the will moved before the Lord Chancellor to discharge the order of the Master of the Rolls.

The *Solicitor-General*, Mr. *Bickersteth*, Mr. *Bligh*, and Mr. *Jacob*, were in support of the motion.

Mr. *Horne*, Mr. *Pemberton*, and Mr. *Stuart*, *contra*.

In support of the motion it was contended, that, there being no direct and uncontradicted evidence as to the precise spot where the attesting witnesses subscribed their names, the case necessarily resolved itself into a question of probability and presumption. The will might have been attested in the bed-room, where the Duke was; or it might have been attested in the adjoining room, and in such a part of the adjoining room as would have amounted to an attestation in the Duke's presence. It was also possible that the witnesses might have subscribed their names in a part of the adjoining room not within the reach of the Duke's organs of sight; but there was no direct evidence in support of that hypothesis. The case had been presented to the jury by the Judge at law in all these ways: they had all the evidence before them; and, upon a comparison of probabilities, two successive juries arrived at the conclusion, that the will was duly executed. Why should two verdicts, given under such circumstances, be corrected? A jury was the tribunal, whose proper function it was, in such cases, to weigh the probabilities,

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to estimate the opposing presumptions, to deduce a conclusion from the various grounds of inference laid before them. Twice had a jury weighed these probabilities, and estimated these presumptions; and twice had they arrived at the same conclusion. To disregard the second verdict, and direct a new trial, would, in effect, be tantamount to a declaration that there should be successive trials of the issue, until at last a verdict should be given against the will; and it was altogether nugatory to direct an issue of *devisavit vel non*, if the verdict was to be set at nought, merely because the Judge in equity, had he been one of the jury, would probably have arrived at a different conclusion. The Plaintiffs in the issue were not asking the Court to assume the function of a jury: their proposition merely was, that the concurrent verdicts of two juries, not dissented from by the Judge who tried the issues, should not be rejected, — especially in a case where the true state of facts could never be ascertained accurately, where the result to be arrived at was necessarily a matter of inference from evidence imperfect and, in some degree, contradictory, and where there was no possibility of throwing new light on the subject by the testimony of other witnesses.

The Plaintiffs in the issue, it was true, had not called Mr. Dundas as a witness, and there was no reason why they should have called him; because it was evident, from his examination in Chancery, that he could give no satisfactory information on the subject. But the Defendants were not taken by surprise; for, nine days before the trial of the first issue, they were informed, that he would not be called by the devisees; and it was the duty of the Defendants to have called him, if they thought his evidence could be of any avail. They knew what he had stated in his depositions in the cause, and they had

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cross-examined him; they therefore should not be permitted to say, that the verdict was to be deemed less satisfactory, because he had not been examined at the trial.

There was direct evidence, it was said, in favour of the due attestation of the will, and there was no direct evidence against it; and, even in the absence of all direct evidence, the presumption ought to be in favour of the due attestation. In *Scotland* it was not usual to affix a seal to such instruments, nor was attestation by three witnesses required. The solemnities, which were observed in the execution of this instrument, were in compliance with *English* forms; and it was therefore clear, upon the very face of the instrument, that the parties were aware of, and meant to comply with, all the forms prescribed by the law of *England*.

The following cases were cited, *Wright v. Manifold* (a), *Sheers v. Glasscock* (b), *Casson v. Dade*. (c)

The LORD CHANCELLOR stated, that he was not satisfied, that, upon all the evidence in the case, the jury had come to a right conclusion. Had there been any facts from which the jury might have fairly inferred, that the will was attested in that part of the adjoining room, where the attestation would have been in the presence of the testator, the Court would not have disturbed their verdict; but he did not find any facts, from which such an inference could be drawn. The evidence preponderated so strongly on one side, that it was almost impossible to come to the conclusion in a court of justice, that the will was attested in the Duke's bed-room; and if the attestation took place, not in the Duke's

(a) 1 *M. & S.* 294.

(b) *Salk.* 688. *Carth.* 81. 1 *Eq. Ab.* 405.

(c) 1 *Bro. C. C.* 99.

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Duke's bed-room, but in the adjoining room, there was not a single circumstance from which the presumption could be raised, that the will was attested in that part of the room which was opposite to the door communicating between the one room and the other. If it had been proved that Mr. *Dundas*, or any of the parties, knew that it was necessary that the will should be attested in the presence of the testator, that would have been a circumstance upon which the jury might have come to the conclusion, that the *Pembroke* table had been removed from its usual place, or that some other proceeding had been taken, in order that the attestation might be made in such a way as to comply with the requisition of the law. But at present there was nothing in the case to lead to such an inference; and the *onus* of proof lay upon the party setting up the will.

His Lordship, therefore, refused the motion, and confirmed the order of the MASTER of the ROLLS. But, as Sir *N. C. Tindal*, who, since the date of that order, had been appointed Chief Justice of the Common Pleas, had been concerned in the former trials as counsel for those who claimed through the co-heiresses at law, the issue was ordered to be tried in the King's Bench.

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July 10.

PRITCHARD v. ARBOUIN.

When a testator directs a sum to be laid out in building a church, the bequest is void; the rule of construction being, that a direction to build includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain.

JAMES ARBOUIN, by his will dated the 25th of February 1821, gave the entire residue of his effects, with the works of "*Baron Swedenborg*," and "*The Intellectual Repository*," to *George Pritchard*, *Leonard Streete Coxe*, and *Thomas Jones*, "for the useful purposes which had been explained to them." The purposes thus referred to were expressed in a paper dated the 15th of March 1821, which was in the hand-writing of and signed by the testator. "From a sincere desire," said he in that paper, "to promote the interests of the Lord's New Church, I hereby request *Mr. George Pritchard*, *Mr. Leonard Streete Coxe*, and *Mr. Thomas Jones*, will have the goodness to dispose of the entire residue of my effects entrusted to their care in the following manner." In the directions which followed, after disposing of a part of a sum of 3 per cent. consols standing in his name, he proceeded in the following words:—"Fourthly, to keep in reserve the remainder of the 3 per cent. consols, and to sell the same, when an opportunity offers, for building a chapel for the worship of the New Church," (meaning a church for worship according to the doctrines of *Baron Swedenborg*,) "and to contribute the same towards the building and its support."

The Master had found, that the religious association, called the New Church, was recognized by law, inasmuch as ministers belonging to it complied with the conditions required by the toleration act; that it adopted for its creed the doctrines taught in the works of *Baron Sweden-*

Swedenborg, that, at the date of the will, there were numerous chapels or buildings set apart for religious worship according to the forms and principles of the New Church; that there was no church or chapel of the New Church built on freehold ground in *England* at the date of the will, but that two such chapels had since been built on freehold ground at *Derby* and *Newcastle-upon-Tyne*.

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The question, upon further directions, was, Whether the bequest was, or was not, void under the mortmain act?

In support of the bequest, it was argued that the will did not contain a direction to lay out the money in the purchase of land. It might be employed in building a chapel on land already in mortmain. *The Attorney-General v. Bowles* (a), *Brodie v. The Duke of Chandos* (b), *The Attorney-General v. The Bishop of Oxford* (c), *The Attorney-General v. The Bishop of Chester*. (d) The words of the will did not even require that the money should be expended in building a chapel: it might be applied in supporting a chapel, and maintaining the worship of the New Church in it. In fact, chapels of the New Church were in existence; and the money might be legally applied according to the intention of the testator.

Mr. *Treslove* and Mr. *Martin*, for the Plaintiffs.

Mr. *Horne* and Mr. *Boteler*, for the Defendants.

The MASTER of the ROLLS, referring to the language of Lord *Eldon* in the case of the *Attorney-General v. Davies*,

(a) 2 *Ves.* sen. 547.

(b) 1 *Bro. C. C.* 444. n.

(c) Cited in 4 *Ves.* 451, 452,
and stated in 1 *Bro. C. C.* 444. n.

(d) 1 *Bro. C. C.* 444.

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Davies (a), stated, that it was the settled rule of construction, that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly pointed to some land which was already in mortmain; — and he declared the bequest void.

(a) 9 *Ves.* 544. “ Whatever were the decisions formerly, when charity in this court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that, unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good.”

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July 10.

ELLISON v. WRIGHT.

A mortgagee is entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage-money.

ON a bill for redemption, the Master of the Rolls gave to the Defendant, the mortgagee, the costs of an action which he had brought against a person who had joined the mortgagor as surety in a bond for the mortgage money, the fruit of the action being lost by the insolvency of the surety; and His Honor stated the principle to be, that the mortgagee was entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage money.

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WALKER v. LODGE.

ROLLS.

July 10. 16.

THOMAS WALKER, the son of *John Walker*, died on the 22d *December* 1815, having by his will charged his real estate with payment of his debts, and, subject thereto, having devised all his property, real and personal, to his widow. *John Walker* the father made his will, bearing date in *January* 1816, and thereby gave an annuity for her life to the widow of his son *Thomas Walker*, and made his grandson, the son of *Thomas Walker*, his residuary devisee and legatee. The real and personal estate of *Thomas Walker* was insufficient for the payment of his debts; and, on the 15th of *May* 1816, *John Walker* the father made a codicil to his will, whereby he directed his trustees and executors to pay the debts of his son *Thomas Walker*.

A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay his son's debts, and named the son of his son his residuary devisee and legatee. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay.

The question in the cause was, whether the father's assets were to be applied in payment of *all* the debts of *Thomas Walker*, so as to leave the real and personal estate of *Thomas* clear for the benefit of the widow; or whether they were to be applied in payment only of such part of *Thomas Walker's* debts as his real and personal estate would be insufficient to pay.

Mr. *Duckworth*, for the Plaintiff.

Mr. *Agar*, Mr. *Sharpe*, and Mr. *Geldart*, for the different Defendants.

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When the father made his will, the period of his death was necessarily uncertain; and it can hardly be

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contended that he considered, that, at the time of his death, his son's estate would remain unapplied towards the satisfaction of his creditors, and meant that his own estate should fully pay all those creditors. Some of them, it is admitted, had actually been paid at the time of making the codicil. If his purpose was, by his codicil, to make a provision for the widow to the extent of the son's estate, that purpose would have been differently expressed; and it must be observed, that this provision for the widow would be at the expense of his grandson, the son of his son, who was his residuary devisee and legatee, — which is not a very probable purpose.

I think, therefore, that the true construction of the father's will is, that, by the direction to pay his son's debts, he intended only the payment of such part of his son's debts, as, after the due application of the son's estate, should remain unsatisfied.

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ADAMS v. AUSTEN.

ROLLS.

July 11. 13.

THE testatrix, *Barbara Maria Cockayne*, by her will, dated the 23d of *May* 1821, gave and devised to trustees and their heirs, upon certain trusts therein mentioned, all her share and interest in a particular estate therein described, “together with all other the manors, messuages, lands, tenements, and hereditaments whereof she had power to dispose.” At the time of making her will she had no power of appointment or disposition over any other lands or hereditaments; but she had a reversionary interest, as tenant in tail, in certain other lands under the will of the late Mr. Serjeant *Hill*, her maternal grandfather.

A general devise of all lands of which the testatrix had power to dispose, is not a good execution of a power to appoint monies, which were to arise from the sale of land.

By indentures of lease and release bearing date the 22d and 23d days of *January* 1823, and by virtue of a comon recovery which was afterwards suffered, the real estates of Mr. Serjeant *Hill* were conveyed and assured to the use of *Barbara Cockayne Medlycott* for her life, and, after her death, to the use of *Charles Tibbitts* and *Francis Hurst*, their heirs and assigns for ever, upon trust to sell the same or to convey the same, or any part thereof, in exchange, and to give or take money for equality of exchange, and in like manner to sell the hereditaments to be received in exchange, and, after payment of the expenses of the trust, and of a sum of 10,000*l.*, to pay over one equal ninth part of the residue of the monies to arise from such sales or exchanges to *Thomas Philip Maunsell* and *William Adams*, upon the trusts for the benefit of *Barbara Maria Cockayne*, which were declared concerning

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the same by another indenture of even date with the release: and it was provided, that it should be lawful for *Tibbitts* and *Hurst* and the survivor of them and the heirs of such survivor, at any time after the decease of *Barbara Cockayne Medlycott*, to convey the hereditaments, or any of them, and also such hereditaments (if any) as might, upon partition, be received in exchange, or any of them, in manner following; that is to say, as to such of the hereditaments as should be allotted as the share of *Barbara Maria Cockayne*, unto and to the use of *Thomas Philip Maunsell* and *William Adams*, or the trustee or trustees for the time being under the indenture of even date, upon the trusts therein declared concerning the same. It was also declared that it should be lawful for *Tibbitts* and *Hurst* and the survivor of them and the heirs of such survivor, to carry into execution the aforesaid trusts for sale, exchange, and partition, or any of them, in the lifetime of *Barbara Cockayne Medlycott*, if she should think fit to concur therein.

The indenture, referred to in the release, and of even date with it, declared, that, *Maunsell* and *Adams* and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of all such principal monies, stocks, funds, or securities as should, in pursuance of the said indenture of release, be paid or transferred to them in respect of the ninth share of the hereditaments and premises, upon the trusts therein mentioned; and under those trusts *Barbara Maria Cockayne* had a power of appointing her share of the monies to arise from the sale. Power was also given them to invest the monies in the purchase of lands to be conveyed to them in trust for sale; and, as to such hereditaments (if any) as, upon partition, might, in pursuance of the indenture of release of even date, be conveyed as the
specific

specific share of *Barbara Maria Cockayne*, to *Maunsell*, and *Adams*, or the trustees or trustee for the time being, it was declared that the rents, issues, and profits of such specific share should, until the same should be sold in pursuance of the trusts, be paid or applied as the dividends or interest of the principal money to arise by the sale thereof, or the stocks, funds, or securities to be purchased therewith, would be payable or applicable in case such sale had taken place.

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After the execution of these deeds, *Barbara Maria Cockayne* made a codicil to her will, dated the 27th of *April* 1824, and duly executed and attested so as to pass freehold estates.

After some argument, it was admitted at the bar, that the codicil was a republication of the will, so that the will was to be considered as brought down to the date of the codicil. The question then was, Whether the devise in the will to the trustees “ of all other the manors, lands, messuages, and hereditaments whereof she, the testatrix, had power to dispose,” would operate as an appointment of the monies to arise from the sale of the settled estates?

At the dates of the will and codicil, and at the death of the testatrix, the estates, which were the subject of the deeds of *January* 1823, remained unsold; and *Barbara Cockayne Medlycott* was still alive.

Mr. Horne and *Mr. Stuart*, for the Plaintiffs, who were mere trustees.

Mr. Sugden and *Mr. Pemberton*, for one set of Defendants.

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Mr. *Pepys* and Mr. *Hodgson*, for other Defendants, who, on the principal question, were in the same interest with the Defendants, for whom Mr. *Sugden* appeared.

Mr. *Shadwell*, Mr. *Bickersteth*, and Mr. *Knight*, *contrd.*

The following cases were cited: *Guest v. Willasey* (a), *Hulme v. Heygate* (b), *Holmes v. Coghill* (c), *Powell v. Lordale*. (d)

The MASTER of the ROLLS.

This is merely a question of intention; and the Court cannot infer that, by a disposition of all lands of which she had power to dispose, she meant to execute a power of appointment not as to lands, but as to monies to arise from the sale of lands. The question would have been very different, if she had devised the settled lands by name. It might then have been argued, that by the devise of the land she meant to describe her interest in the land.

(a) 2 *Bingh.* 429.

(b) 1 *Mer.* 285.

(c) 7 *Ves.* 499. 12 *Ves.* 208.

(d) 2 *B. & A.* 291.

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BARRY v. WREY.

ROLLS.

July 10. 16.

THIS was a bill by a second mortgagee to redeem the first mortgagee and to foreclose the mortgagor. After the usual decree to have the accounts taken, the Defendant, the first mortgagee, assigned his mortgage; and the assignee was brought before the Court by a supplemental bill.

Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage, after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mortgage before the Court.

At the hearing on further directions, the question was, whether the assignee of this first mortgagee was entitled to the costs of the supplemental bill.

Mr. *Agar* and Mr. *Parker*, for the Plaintiff, contended, that the party who came to redeem ought to have the costs of the supplemental suit from the first mortgagee and his assignee, or, at least, that these defendants ought not to be allowed their costs of proceedings, which had been made necessary by their own voluntary acts.

Mr. *Ellison*, *contra*.

The principle of the Court is, that a mortgagee cannot be redeemed, except upon the terms of being indemnified against all costs arising out of his legal acts. If, pending a suit, a mortgagee assigns his security vexatiously, and for the purpose of harassing those who are interested in the equity of redemption, there would be a sufficient ground to justify the Court in departing from the general rule. No such special ground is alleged to exist here; and to refuse the mortgagee the costs of the supplemental suit would in fact be to say, that a mortgagee shall not assign his mortgage, while a suit to redeem him is pending.

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The following cases were cited: *Skipp v. Wyatt* (a), *Durbaine v. Knight* (b), *Wetherell v. Collins*. (c)

The MASTER of the ROLLS held that, the assignment being made after the decree for the accounts, the mortgagor could not be charged with the costs of the supplemental bill.

(a) 1 Cox, 353.

(b) 1 Vern. 318.

(c) 3 Mad. 255.

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July 16. 25.

LEWIS v. KENNETT.

In pauper suits, the Court will not compel a solicitor to act for the pauper; but the course is, to assign to him counsel and a six-clerk; and it is the duty of the six-clerk to appoint one of the sixty clerks of his office to act on the part of the pauper.

A PARTY had been duly admitted to proceed in *forma pauperis*; and the Court had assigned to him a six-clerk and counsel.

Mr. *Pemberton* now applied to have a solicitor appointed to act in the cause for the pauper; stating, in support of the application, that the six-clerk did not act and could not be compelled to act as solicitor, and that, without the appointment of a solicitor, the assigning of a six-clerk and counsel was altogether nugatory.

The MASTER of the ROLLS directed that the practice on this point should be inquired into; and, on a subsequent day, his Honor stated, that the course of the Court was to assign merely counsel and a six-clerk to the pauper, but that it was the duty of the six-clerk so named to appoint one of the sixty clerks of his office to conduct, as solicitor, the proceedings on the part of the pauper.

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COLLIER *v.* SQUIRE.

ROLLS.

July 26. 30.

JOSEPH MARTIN, previous to his marriage with *Mary Allan*, transferred to trustees a sum of 3715*l.* 3*s.* 4*d.* Navy 5 per cent. annuities; and, by a settlement made in contemplation of the marriage, and dated the 7th of *July* 1807, it was witnessed, that the trustees should hold the stock, upon trust, after the marriage, to pay the dividends to his intended wife during her life for her separate use; and after her death, to transfer the stock to *Joseph Martin*, his executors, administrators, or assigns, in case he should survive her; but, in case he should die before her, then, after her death, to transfer the stock as *Joseph Martin* should by deed or will appoint; and, in case he made no appointment, then to his executors and administrators.

By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and, after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should by deed or will appoint; and in default of appointment, for his executors and administrators: the husband died in the wife's lifetime, having

The marriage was solemnized. *Joseph Martin* afterwards died in the lifetime of his wife, having made a will, dated the 18th *July* 1809. In that will he took no notice

ing appointed an executrix, but without exercising his power: Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate.

The husband by his will bequeathed as follows: — “And unto my wife (who I make full and wholly executrix) I give my house, with all my household furniture, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses:” Held, that the beneficial interest in the settled stock did not pass to the wife.

A nephew, who was the heir-at-law and sole next of kin of the testator, having taken the opinion of counsel as to the widow's rights under her husband's will, and being advised that she took the residue absolutely, contracted to sell to her a house which had descended to him as heir; and part of the agreement was, that he should release all demands against her as executrix, or against her deceased husband's personal estate: a general release, executed in pursuance of this agreement, was held to be valid, and to vest the stock in the executrix absolutely, though it made no specific mention of the stock.

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notice of the settled stock ; but, after giving some pecuniary legacies, and, among others, a legacy of 100*l.* to his nephew *William Martin*, he used the expressions which follow : — “ And unto my wife, who I make full and wholly executrix, I give and bequeath my house, with all my household furniture of every description, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses.”

Upon proving the will, the widow represented the personal estate as under the value of 3500*l.*

In *May* 1810, shortly after the death of *Joseph Martin*, a case was laid before the late Mr. *Hollist* on behalf of *William Martin*, who was the heir at law and sole next of kin of *Joseph Martin*, upon the question, whether the whole residuary personal estate passed to the widow of *Joseph Martin* by his will : and Mr. *Hollist* gave his opinion, that, under the appointment of executrix and the bequest to her in the will, the widow did take the whole residuary estate beneficially. This case made no mention of the stock which was the subject of the settlement.

About the same time the widow took the opinion of the late Mr. *Johnson* upon the same point ; and the case laid before him stated the amount of the settled stock and the trusts declared of it. Mr. *Johnson's* opinion was as follows : — “ It is clear that this will does not operate as an appointment ; but Mrs. *Martin*, as the sole executrix of her late husband, is entitled to have the stock and dividends, and any other stock standing in his name at his death, or in the name of any other

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other person in trust for him, transferred and paid to her. Whether or not she is entitled to the whole beneficially, is a question of great doubt. I am inclined to think she is so entitled, though most probably the next of kin will be advised to take the opinion of a court of equity upon the subject."

In *December* in the same year, *William Martin*, executed a deed of release to the widow, whereby, — after reciting that the widow had agreed to purchase from him, for a sum of 850*l.*, a freehold house, which had descended to him as heir at law of *Joseph Martin*, and that at the time of such contract it was agreed that, upon its completion, he should release the widow from all rent which had accrued due in respect of the house sold, she having occupied the same since her husband's death, and "from all other sum and sums of money whatsoever and howsoever," — the said *William Martin*, "in pursuance of the said agreement, and in consideration of five shillings to him paid by *Mary Martin*, and for divers other good causes and considerations," released the widow, and her lands, goods, and chattels, and also the personal estate and effects of the testator, from all claims which he had or might have against her as executrix of *Joseph Martin*, or against the personal estate and effects of the testator, "by reason of his being nephew and heir at law of *Joseph Martin*, or a legatee named in his will, or otherwise."

It did not appear that *William Martin* was apprised of the trusts of the settlement of 1807, or of the existence of the stock, or that the case laid before Mr. *Johnson*, or that gentleman's opinion, had been communicated to him.

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William Martin survived the execution of this release some years, and then died, leaving one of the Defendants in this suit his executrix and residuary legatee. The widow of the testator died in 1822; and the bill was filed by a party who claimed under her will, for the purpose of obtaining a declaration, that she became entitled absolutely to the settled stock, either under the will of her husband or by virtue of the release executed in *December 1810*.

Three questions were made:

First, as to the construction of the settlement, with respect to the limitation to the executors or administrators of *Joseph Martin*, in case he should not execute his power of appointment:

Secondly, whether by the will of *Joseph Martin* his widow took his whole residuary estate:

Thirdly, whether the release executed by *William Martin* was to be avoided.

Mr. Sugden and *Mr. Seymour*, for the Plaintiff.

I. The reversionary interest in this sum of 3715*l.* stock never became vested in *Joseph Martin*; for the stock was to be his absolutely, only in case he survived his wife; and that event did not happen. If he died in her lifetime, and did not make an appointment, the stock was by the settlement expressly limited to his executors or administrators; and, therefore, upon his death, without having made an appointment, his widow, *Mary Martin*, as his executrix, became entitled to the stock beneficially. *Sanders v. Franks (a)*, *Evans v. Charles. (b)*

II. If

(a) 2 *Madd.* 147.

(b) 1 *Anst.* 128.

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II. If the limitations of the settlement be so construed as to vest the absolute property of the stock, subject to the wife's life-interest, in *Joseph Martin*, the words of the will are sufficient to pass it. The testator, in appointing his wife "full and wholly executrix," must have meant to do more than to confer merely an office upon her. The bequest, "of every other article belonging to me, both in and out of my house, and which may not be herein mentioned," is expressed in words sufficiently large to comprehend the residue of his property; and that such must have been his intention, is apparent from his having made the gift subject to the payment of his debts and funeral and testamentary expenses.

III. If the will did not give the widow the beneficial reversionary interest in the stock as a part of the residue, the release of *William Martin*, the only person who, as sole next of kin, could have claimed against her, made her title perfect. His attention had been called to the question which might be raised on the construction of *Joseph Martin's* will; and he had taken the opinion of counsel upon it. Whether he was informed of the existence of this specific sum of stock, cannot, at this distance of time, be ascertained; but as probate duty was paid on 3500*l.*, he must have been aware that the residue was of considerable value. Under these circumstances, it is made part of an arrangement relative to the purchase of a house, that he shall release all claims on the executrix of *Joseph Martin* and on *Joseph Martin's* personal estate; and such a release is executed by him. He survives several years, and never once impeaches it; and it is not till a dozen years after his death, that a person, claiming under him as a volunteer, alleges that the release ought not to be treated as a valid instrument. The operation of the release was to annex the beneficial interest to the legal

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legal title of the executrix; and there is no ground on which its operation can be abridged or annihilated.

Mr. *Tinney* for *Sarah Martin*, who claimed through *William Martin*.

I. The limitation, in default of appointment, to the executors or administrators of *Joseph Martin*, would operate for the benefit, not of the person who might happen to be his legal personal representative, but of his next of kin. *Bridge v. Abbot* (a), *Jennings v. Gallimore* (b), *Long v. Blackall* (c), *Horseman v. Abbey* (d), *Price v. Strange*. (e) On what rational ground can it be supposed, that the settlor intended that this sum of stock should, if his wife survived him, belong, after her death and his own, to the person who might happen to fill the character of his personal representative? That person might be a creditor, or one of many relations standing in equal degrees of consanguinity. Suppose that *Joseph Martin* had appointed some other person than his wife to be his executor, and that, the person so appointed having died in his lifetime, a creditor had taken out administration with the will annexed, could it have been contended that such an administrator was to be entitled to the stock absolutely?

The decision in *Evans v. Charles* (g) turned on the particular nature of the gift: it has been questioned in *Price v. Strange*; and it can afford no safe rule of construction, where the circumstances are not precisely similar. In *Sanders v. Franks* (h) the gift was “to the executors or administrators of the wife, to and for his, her,

(a) 3 Bro. C. C. 225.

(b) 3 Ves. 146.

(c) 3 Ves. 486.

(d) 1 Jac. & W. 381.

(e) 6 Madd. 159.

(g) 1 Anst. 128.

(h) 2 Madd. 147.

her, or their own use and benefit ;” and it was only by reason of the latter words that the Court held that the administrator took beneficially.

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II. If the stock be considered as having remained, under the limitations of the settlement, the absolute property of *Joseph Martin*, subject to his wife’s life-interest, the wife takes it as executrix ; but as the will does not contain any disposition of the residue, or of the beneficial interest in this stock, and as the executrix has a legacy given to her, she becomes a trustee of the residue, including the stock, for the next of kin of her husband. The clause, on which the Plaintiff has relied as an express gift of the residue, is the following — “ as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned.” But this is merely a bequest of specific things ; and the words “ every other article” must be confined to articles *ejusdem generis* with those which had been mentioned immediately before. They would not pass money actually in the house ; much less would they pass an equitable interest in stock or the general residue of the testator’s property. *Trafford v. Berrige* (a), *Chapman v. Hart* (b), *Moore v. Moore* (c), *Jones v. Sefton*. (d)

III. Thus, on the death of *Joseph Martin*, the beneficial reversionary interest in the settled stock became vested in *William Martin*, as sole next of kin ; and the only question is, Whether his right was extinguished by the release executed in 1810 ? In equity, that instrument ought not to be allowed to prevail. The 850*l.* was the price paid for the house ; and there was no consideration for the release of all claim and demand against *Mary*

(a) 1 *Eq. Cas. Abr.* 201.

(c) 1 *Bro. C. C.* 127.

(b) 1 *Ves. sen.* 271.

(d) 4 *Ves.* 166.

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Mary Martin as executrix, or against the personal estate and effects of her husband. *William Martin* was not informed of the existence of the settled stock, or of the trusts of the settlement; he knew nothing beyond what appeared on the face of the will; and it was impossible thence to collect any idea of the nature or extent of his rights. The executrix, if she had meant to deal fairly, would have communicated to him the case laid before *Mr. Johnson* and the opinion given upon it. The release, therefore, was executed by *William Martin*, in ignorance of his rights, and without consideration; and the executrix, while she was inducing him to take this step, was in possession of information, essential to a full understanding of his situation, which she did not impart to him.

Mr. Barber and *Mr. J. Russell*, for other Defendants.

The MASTER of the ROLLS.

The settled stock being the property of *Joseph Martin* before the marriage, and the purpose of the settlement being only to make a provision for the wife during her life, the presumed intention must be, that, after her death, it was again to become a part of the estate of *Joseph Martin*; and by the limitation to the executors or administrators of *Joseph Martin* I cannot intend, that it was meant as a gift by him to the uncertain person who might happen to obtain letters of administration of his property. His purpose must have been, that the stock was to be administered by his executors or administrators as a part of his general personal estate.

I am not warranted to declare, that the whole residuary estate of *Joseph Martin* passed to his widow by his will. The words — “ I make her full and wholly executrix ” —

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ecutrix"—have no certain meaning beyond an intention that she should be sole executrix. The gift to her of "every other article belonging to me, both in and out of my house, and which may not be mentioned herein," cannot reasonably be considered as extending to stock. The articles mentioned were household furniture, plate, china, books, and linen; and he could scarcely say of stock, that it *might* not be mentioned or included in the articles specified. No certain inference arises from the direction that the gift to her should be subject to the payment of legacies, debts, and funeral expences; for the specific gift might be so subject.

The remaining question is as to the release. It is said, no adequate consideration was given for this release. The sole next of kin had been advised by high authority, that he had nothing to pass by his release; and, where disputed claims are compromised, the party actually entitled cannot afterwards claim the value of his rights. It is said further, that he was ignorant of the existence of the stock. At this time of day, that fact cannot be ascertained. He was perfectly well aware of the question as to the widow's claim to the whole residuary estate; and the circumstance that, upon proving the will, she had sworn that the personal estate was only under the value of 3500*l.*, of which he cannot be presumed to have been ignorant, must have apprised him, that this question was of considerable value. To avoid this release now would be to act upon mere conjecture.

It must, therefore, be declared, that, by the effect of the will of *Joseph Martin* and by the release of *William Martin*, the widow became entitled to the settled stock as a part of the general personal estate of *Joseph Martin*.

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July 27. 30.

SCOTT v. NICOLL.

HAMPSON v. NICOLL.

The heir of the mortgagee, to whom the legal estate in the mortgaged premises has descended, is a necessary party to a bill of foreclosure filed by the executor of the mortgagee.

A MORTGAGEE filed a bill of foreclosure, and died before the cause came to a hearing. The suit was revived by his executor; but the heir of the mortgagee was not made a party to the bill of revivor. The suit now came on to be heard; and a question was made, whether the heir of the mortgagee, in whom the legal estate of the mortgaged premises had become vested, was not a necessary party.

Mr. *Horne* and Mr. *Rose*, for the Plaintiffs.

Mr. *Bethell*, for the Defendant.

The MASTER of the ROLLS.

In the case of *Wood v. Williams* (a), a bill of foreclosure was filed by the *cestuique* trust of a mortgage; and I there considered that the trustee of the legal estate must be a party, in order that the mortgagor might have the benefit of an order of the Court for a reconveyance, in case he should redeem. The same principle applies here, where the heir of the mortgagee is a trustee of a legal estate for the executor.

(a) 4 *Madd.* 186.

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ROLLS.

July 31.

JOHNSON v. TELFORD.

IN this case there was a decree for an account against the executors and trustees of a testator, whose affairs had been left in such a situation as to require much professional assistance in the administration of the assets. In taking the accounts, the executors claimed credit for 3135*l.*, as the amount of bills of costs which they had paid to their solicitor in the course of seven years ; and, in support of their discharge, they produced the bills and receipts for the amount. None of the bills had been taxed. The amount being objected to by some of the parties beneficially interested, the Master did not proceed to a regular taxation of the bills, but handed them over to the proper officer to be looked over and moderated ; and the result was, that about 292*l.* was deducted by small abatements from a multitude of charges. These sums the Master disallowed to the executors and trustees in their accounts ; and they took an exception to his report in respect of the deduction and disallowance of the 292*l.*

An executor or trustee is not entitled to be allowed without question the amount of bills of costs which he has paid *bond fide* to the solicitor to the trust ; and the Master, without regularly taxing the bills, will moderate their amount.

Mr. *Temple* and Mr. *Knight*, in support of the exceptions.

These executors and trustees have, from time to time, paid the bills of costs of the solicitors to the trust, in the same way as any private gentleman would have paid the bills of his own solicitor : they have not been guilty of any negligence ; and absence of good faith cannot be imputed to them. It is not the duty of a trustee to insist, in every case, on the taxation of bills of costs of the solicitor to the trust ; and, in the present instance, the

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taxation of the bills against the solicitor would probably have occasioned an expense exceeding the sum which has been struck off. If *cestuis que trust* wish to have the bills of costs taxed, it is competent to them to obtain an order of taxation, and to use the name of the trustee in the proceedings; *Hazard v. Lane* (a); but if they do not choose to take that course, and a trustee honestly pays bills, which on the face of them appear to be moderate, it is not reasonable to disallow in his accounts any part of the sums which he has so paid, on the ground that, on taxation, some small abatements in the charges might have been made. This species of *quasi* taxation, if sanctioned at all, ought to be applied as against the solicitor, and not as against the trustee.

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To allow this exception would be to overturn a practice which has long prevailed in the Master's office, and which is rather a matter of indulgence than of hardship upon executors. It cannot be contended, that an executor is to be allowed without question whatever sum he thinks fit to pay to his solicitor; and the principle of moderating the bill by a deduction from charges, which, upon the face of them, are irregular or excessive, instead of submitting the bill to taxation, is great liberality towards an executor.

(a) 5 Mer. 285.

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VAWSER v. JEFFERY.

July 16, 17.

1828.

Dec. 5.

GUYLOTT COWHERD, by his will, dated the 24th of *April* 1794, devised certain lands, partly copyhold, to the persons therein named. The copyholds had been surrendered to the use of his will; and portions of them were comprised in the same sets of limitations, in favour of the same devisees, with parts of the freehold estate.

A testator, having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life, and after his death, to the intent that the wife might receive annually a rent-charge, which was secured by powers of distress and entry, and by a term of years; and, subject to the rent-charge and the term, to the use of the settlor, his heirs and assigns; and he covenanted to surrender the copyholds to the uses of the settlement.

By indentures of lease and release, dated the 14th and 15th of *February* 1800, executed in contemplation of the marriage of *Guylott Cowherd* with *Anna Budd*, — reciting that it had been agreed, in order to make a provision for *Anna Budd*, in case she should survive him, that he should charge certain real estates with the payment of a yearly rent-charge of 300*l.* by way of jointure for her during her life, — *Guylott Cowherd* did bargain, sell, release, and confirm unto *Charles Lea Jeffery* and *Daniel Burley* and their heirs several freehold and copyhold estates therein described (comprising some of those freeholds and copyholds which he had devised), to hold the same to them, their heirs and assigns, to the use of *Guylott Cowherd* and his heirs until the solemnization of the marriage, and thenceforward to the use of *Guylott Cowherd* and his assigns during his life, without impeachment of waste; and, after his decease, to the intent that *Anna Budd* and her assigns, in case she should

The marriage was solemnized, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement: the covenant to surrender did not operate as an entire revocation of the devise of the copyholds, but was a revocation only so far as the particular purposes of the settlement required.

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should survive him, should receive during her life, in bar of dower and thirds, a yearly rent-charge of 300*l.*, to be issuing out of the before-mentioned lands, with powers of distress and entry, and subject thereto, to the use of *Charles Lea Jeffery* and *Daniel Burley*, their executors, &c. for the term of ninety-nine years from the decease of *Guylott Cowherd*; remainder to the use of *Guylott Cowherd*, his heirs and assigns. A power of leasing was given to *Guylott Cowherd* during his life: and he covenanted with the trustees to surrender and assure such parts of the premises as were copyhold to the uses, upon the trusts, and for the intents and purposes declared in the indenture of release. The trusts of the term of ninety-nine years were merely for better securing the wife's annuity.

Guylott Cowherd died in *May* 1801, leaving his widow surviving, and without having surrendered any of his copyhold estates to the uses of the settlement.

The bill was filed by the persons who were his co-heiresses at law and by the custom, against the trustees of the settlement, the widow, and the devisees named in the will of 1794.

There were two questions in the cause:

First, whether the devise of the freeholds was revoked by the conveyance made by the settlement of *February* 1800.

Secondly, whether the devise of the copyholds was revoked by the covenant to surrender them to the uses of that settlement.

On the 8th of *February* 1810, Sir *William Grant**
made

* The case in this stage is reported in 16 *Vesey*, 519., where the settlement is more fully stated.

made a decree, which declared “ that the will was revoked as to the freehold estate by the settlement bearing date the 15th of *February* 1800, and that the will as to the copyholds was revoked in equity by the covenant in the settlement to surrender the copyholds to the uses of such settlement.”

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From this decree the devisees appealed.

On the argument of the appeal, Lord *Eldon* * was of opinion, that the devise of the freeholds was revoked by the subsequent conveyance ; and, as to the other point, he directed a case to the Court of King’s Bench. The case stated, that an actual surrender to the uses of the settlement had been made ; and the question was, whether the devise of the copyholds was revoked by that surrender.

The Judges of the Court of King’s Bench † certified, that the surrender of the copyholds made by *Guylott Cowherd* to the uses of the settlement did not revoke the surrender to the use of his will and the devise of such copyholds.

On this certificate, the case was again argued before Lord *Eldon* on the equity reserved ; but no judgment had been pronounced when his Lordship retired from office.

It was re-argued before Lord *Lyndhurst*.

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Sir *Charles Wetherell*, Mr. Serjt. *Scriven*, and Mr. *Wilbraham*, for the Appellant.

Mr.

* The argument before Lord *Eldon*, on the appeal, is reported in 2 *Swanst.* 268.

† The argument in the Court of King’s Bench is reported in 3 *B. & A.* 462.

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Mr. Roupell and Mr. Wheatly, contra.

On behalf of the appellant the point made was, that the devise of the copyholds could not be revoked by the covenant to surrender them to the uses of the settlement, since such a covenant could not have a greater effect than the surrender itself would have had; and the Court of King's Bench had decided that an actual surrender would not have been a revocation.

On the other hand, it was argued, that the case was not disposed of, even if the certificate were not questioned. The Court of King's Bench had stated what the effect of a surrender would have been; but they had not said what would have been the consequence, if a surrender had been made to the uses of the settlement, and the trustees had been actually admitted under that surrender. A surrender alone would not have been an execution of the trusts of the settlement; it must have been followed by the admittance of the trustees; and the question was, whether the change of estate, which would have been thus effected, must not have operated as a revocation of the prior devise. That question was not touched by the certificate.

It was further argued, that the decision of the Court of King's Bench, even on the subordinate question which the certificate purported to decide, could not be sustained. It appeared to have proceeded mainly on the two authorities of *Roe v. Griffiths* (a) and *Thrustout v. Cunningham*. (b) Of these the former did not turn principally on the doctrine of revocation; and as to the latter, Sir *Wm. Grant* had observed, that the question of revocation could not even arise in it. One inconsistency,
flowing

(a) 4 *Burr.* 1952. (b) 2 *Blackst.* 1046.

flowing from the doctrine asserted by the certificate, was, that the clear intention of the testator, that certain parts of his copyhold estate and certain parts of his freehold estate should go together to the same persons, was defeated. The devise being revoked as to the freeholds, it must be assumed that it was not the intention of the testator that the will should carry the freeholds to the devisee; and as the copyholds and freeholds were not to be severed, must it not be inferred, that it was equally his meaning, that the will should not operate on the copyholds?

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The LORD CHANCELLOR.

1828.
Dec. 5.

A person of the name of *Guylot Cowherd*, being seised of certain freehold and copyhold estates, and having in 1794 surrendered the copyholds to the use of his will, made a will disposing of the freehold and copyhold estates in different portions to different individuals. Afterwards, in the year 1800, he executed a settlement in contemplation of his marriage, which subsequently took effect; and the settlement contained a covenant to surrender the copyhold estates to the uses of the settlement.

When the case came on before Sir *William Grant*, then Master of the Rolls, he was of opinion (and that point is not now contested), that the settlement was a revocation of the will, as far as related to the freehold property (a); but he thought that the question as to the copyhold estate was subject to a different consideration. He said, upon the authority of several cases to which he referred — *Ryder v. Wager* (b), *Cotter v. Laver* (c), and *Knollys*

(a) 17 *Vcs.* 526. (b) 2 *P. Wms.* 328. (c) 2 *P. Wms.* 622.

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Knollys v. Alcock (a), that an agreement to convey would constitute in a court of equity a revocation; that here was a covenant to surrender; that, in his judgment, if a surrender had actually been made to the uses of the settlement, it would have amounted to a revocation of the will; and that, as the covenant to surrender was equivalent to the surrender itself, he was of opinion that the will was revoked as far as related to the copyhold property.


Lord *Eldon*, when the case came before him, entertained doubts, whether the surrender, if made, would have amounted to a revocation of the will, so far as related to the copyhold property; and he directed a case for the opinion of the Court of King's Bench. He said — 'The effect of a surrender is a purely legal question: if the present case can be distinguished from *Cave v. Holford* (b), it is material that it should be so distinguished by a court of law; and to such a court the question must be addressed (the surrender being stated to have been made), quite clear of all considerations of equitable revocation.'

In consequence of this opinion, it was referred to the Master to prepare a surrender conformably to the settlement; that surrender was prepared, and not questioned; and, as appears to me from the best consideration I can give to the instrument, it conformed substantially to the covenant, at least for the purposes of the present question.

The case was argued before the Court of King's Bench: and the four Judges of that Court certified, that,
in

(a) 5 *Ves.* 648.(b) 2 *Ves.* jun. 604.

in their opinion, the surrender of the copyhold property to the uses of the settlement did not amount to a revocation of the will, as far as related to the copyholds. That opinion of the Court of King's Bench has been contested in the argument here: but it does not appear to me that it is contested upon any solid grounds. It seems to me impossible to impeach the grounds on which the decision of the Court of King's Bench was founded.

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When a copyholder surrenders to certain uses, all the estates, which are created, are not necessarily new estates; they are new estates only in so far as the uses, to which the surrender is made, differ from the estates which existed in the surrenderor at the time of the surrender. That is the doctrine to be collected from *Roe v. Griffiths* (a) and *Thrustout v. Cunningham* (b), but more fully and diffusely explained in Mr. *Fearne's* work (c); and it was upon the principle of those cases, that the Court of King's Bench founded their judgment. They said, on looking at the surrender, that it was clear that the object of it was merely to create a rent-charge, and to create an interest in the land as a means of giving effect to that rent-charge, and of securing the payment of it. By the surrender, therefore, nothing more passed out of the surrenderor than was necessary for those purposes. When a surrenderor surrenders what in terms returns to himself, he takes that interest not as under the surrender but as part of his old estate; he is in of his old estate. In this case, therefore, all the estate which was not conveyed by the surrender, and did not pass by it for the purpose of securing the rent-charge of 300*l.* a year, remained in the surrenderor, not as under the surrender,

(a) 4 *Burr.* 1952.

(b) 2 *Blackst.* 1046.

(c) *Fearne on Contingent Remainders*, 68—70.

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surrender, but in respect of his old estate. The estate in that respect did not undergo any change. If it underwent no change, (as is clearly the doctrine of the cases I have referred to), then it follows that what was done did not constitute a revocation with respect to the copyhold property; that is, it did not operate as an entire revocation, but was a revocation only as to the partial interest, the new estate, which was created by the surrender.

It was supposed, when the case came here, that the observation of the Master of the Rolls upon the case of *Thrustout v. Cunningham* was not sufficiently attended to by the Court of King's Bench; but, on referring to a manuscript report of what passed in the Court of King's Bench on that occasion, I find it was fully considered, and that the very observation of the Master of the Rolls was strongly pressed upon the Court by the present Solicitor-General. The case of *Thrustout v. Cunningham* is certainly not a case of revocation; it is a case establishing the principles to which I have adverted with respect to the legal effect of a surrender upon the estate of the surrenderor, in reference to the estates that arise under the surrender.

Again, when the case came here, it was supposed, adverting to the short printed report, that it had not undergone much consideration in the Court of King's Bench; but, looking at the manuscript report, I find that it underwent much consideration, and that the Court itself took a great share in the discussion. From the beginning to the end, the Court were actors in the argument.

If, then, this is a pure question of law, — if it has been decided by a court of law, — if, in my judgment, there
is

is no ground for impeaching that decision, — if the principles upon which that decision rests are solid principles, — what is the consequence? The judgment of the Master of the Rolls was founded upon the assumption that a surrender, if actually made, would have been a revocation; that a covenant to surrender was, in this Court, tantamount to a surrender; and that, therefore, there had been a revocation. But if the foundation fails, the whole of that which is built upon it must also fall.

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There was another point, which was supposed not to have been sufficiently considered by the Court of King's Bench; namely, whether there was not in this case an intention to revoke? But in fact that question was much considered. The greater part of the Solicitor General's argument turned on that point. He contended, that it was the intention of the testator that the freeholds and copyholds should go together, and that, as there was a revocation with respect to the freeholds, he must have intended to revoke the will as to the copyholds also. The answer, which the Court of King's Bench gave to that argument (and it is a decisive answer), was, that the will was revoked as to the freeholds, not by any manifestation of intention on the part of the testator, but by the change that had taken place in his estate; and, therefore, that the revocation of the will as to the freeholds did not afford any ground for inferring, that there was an intention to revoke the devise of the copyholds.

For these reasons I am of opinion, that the decree of the Master of the Rolls must be reversed, in so far as it declares, that the testator's will was, as to the copyholds, revoked in equity by the covenant in his marriage settlement to surrender the copyholds to the uses of that settlement.

1827.

July 24.
Oct. 30.

WINTER v. LORD ANSON.

By an agreement for the sale of an estate, the purchase-money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase-money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest, within twelve months after the death of the vendor; and of interest in the mean time. The vendor was held to have a lien on the estate for the amount of the bond.

THE facts of this case are stated in 1 *Simon and Stuart*, 434., and they are briefly recited in the following judgment of the Lord Chancellor.

The Plaintiffs appealed from the Vice-Chancellor's decree.

Mr. Heald and *Mr. Wheatly*, for the Plaintiffs.

Mr. Sugden, *Mr. Bickersteth*, and *Mr. Spence*, for the Defendants.

On the hearing of the appeal, the same cases were cited and the same topics urged, as in the argument before the Vice-Chancellor.

The appellants contended, that nothing had been done here which shewed an intention to relinquish the lien, and to rely on merely personal security, or which brought the case within the scope of any of the authorities in which the lien had been held to be gone.

On the other hand, the respondents contended that the existence of a continuing lien was incompatible with the contract and the nature of the transaction. The agreement was, not that the money should be paid, before the estate was vested in the purchaser, but that the payment of it at a future time should be secured in a particular manner. No lien existed during the life of the vendor; and a lien could not arise after his death. If the lien was to continue, the parties must have intended that

that this estate should not be at the disposition of the purchaser, till the vendor was dead; for the effect of the lien would be, that, in equity, the purchaser was *pro tanto* merely a trustee. Here the purchaser had no means of getting rid of the lien; for, while the vendor lived, he could not have compelled him to accept payment: and it was impossible to pronounce a decision in favour of the alleged lien, without imputing to the parties a most improbable intention. The special nature of the contract afforded strong proof that it was not their purpose, that the estate should remain a security for the ultimate payment of the price.

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The LORD CHANCELLOR.

Oct. 30.

William Winter being seised of a certain estate, entered into an agreement for the sale of it to *William Mousley*. By the agreement, *Winter*, in consideration of the sum of money therein mentioned, agreed to convey the estate to *Mousley* in fee, free from all incumbrances; and *Mousley* agreed to pay to *Winter* on the 29th of *September* then next, on the execution of the conveyance and completion of the surrender, the sum of 75*l.* per acre for the estate; and it was thereby also agreed, that the amount of such consideration money should be secured by the bond of *Mousley* to *Winter*, with interest at 4 per cent., and should remain so secured during the life of *William Winter*, on the regular payment of such interest.

The estate was measured, and the purchase-money found to amount to 1485*l.* The conveyance expressed that the whole purchase-money had been paid; but in fact the sum of 485*l.* was the only part of it which had been paid. *Mousley* executed a bond to *Winter*

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in the penal sum of 2000*l.*, conditioned to be void on payment by *Mousley* to the executors, administrators, or assigns of *Winter* of the sum of 1000*l.*, the remainder of the purchase-money, within twelve months after the decease of *Winter*, with interest in the mean time at 4 per cent.

Mousley, having paid the 485*l.* and executed this bond, was let into possession of the estate. He afterwards, in the year 1817, became a bankrupt; and his assignees sold the estate to Lord *Anson*, allowing him to retain 1200*l.* as an indemnity against the claim of the Plaintiff.

The interest on the sum secured by the bond had been paid to *September* 1816, but not afterwards; and in *May* 1819 *Winter* died.

The question is, Whether, under the circumstances of this transaction, the vendor retained a lien upon the premises sold to the vendee for that portion of the purchase-money which was secured by the bond. The assignees, who represent the vendee, contend, that they are entitled to keep the estate, without paying what remains due of the purchase-money.

In general, where a bill, note, or bond is given for the whole or any part of the purchase-money, the vendor does not lose his lien for so much of the money as remains unpaid. The circumstance that in these cases the money is secured to be paid at a future day, does not affect the lien. In the present instance, the bond was taken as a security for the payment of part of the purchase-money, twelve months after the death of the purchaser, with interest at the rate of four per cent. in the mean time. I do not think that the lien is affected
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by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge; and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity.

It was said in the argument, that this was the case of an annuity; and *Mackreth v. Symmons* (a) was cited on the part of the defendant: but the grounds of the judgment in that case do not apply to the present. In observing upon that part of the question which related to the annuities, Lord *Eldon* reasons upon the nature of the annuities: they were upon lives. “If the annuities (b),” he said, “had been paid, there must have been a difference in the estimation; also, *de anno in annum*, the value was decreasing, not only as the annuities were wearing out, but also as the number of annuitants was decreasing by death. It is impossible, it is not natural,” he observes, “to suppose that parties, dealing for the consideration of annuities and the purchase of a reversion, which might not take effect in possession, until all the annuitants were dead, relied on that reversion as security in addition to the indemnity by the bond.”—“I have felt from the first,” he said, “that there is upon the part of the Plaintiff that natural justice and equity, which excite a wish that I could enforce the lien;” but as far as related to the annuities, he was of opinion, upon the particular grounds which I have stated, that he could not. I may add, that, even in the

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(a) 15 Ves. 529.

(b) 15 Ves. 350, 351.

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case of an annuity for lives, Lord *Camden*, in *Tardiffe v. Scrughan* (a), was of opinion in favour of the lien. Here, however, what is called the annuity is in fact nothing more than the interest of so much of the purchase-money as remained unpaid, and which interest was of course to continue until the principal should be discharged.

As in this case, then, there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared, that the Plaintiffs have a lien upon the estate in question for the residue of the purchase-money.

The only point argued was the question of the lien as between the vendor and vendee, in whose place Lord *Anson* stands; and I wish to be understood, it is upon that point only that judgment is given.

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There is no distinction between copyholds and freeholds, as to the doctrine of a vendor's lien for his purchase-money.

After the principal question was disposed of, two other points were raised on behalf of the assignees: first, that the mortgage was to be preferred to the lien of the vendor, and that the assignees, having redeemed the mortgage, had, to the amount of the mortgage-money, priority over the lien; secondly, that the doctrine of lien did not extend to copyholds, and, therefore, that the lien of the vendor here was to be confined to that part of the property which was freehold.

Mr. *Sugden*, Mr. *Bickersteth*, and Mr. *Spence*, for the assignees.

Mr.

(a) Stated in *Blackburne v. Gregson*, 1 Bro. C. C. 423.

Mr. *Preston* and Mr. *Wheatley*, *contra*.

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After the principal question had been decided, it was contended, on behalf of the assignees, that the mortgage was to be preferred to the lien, and that the assignees, having redeemed the mortgage, and paid the money due in respect of it, were entitled, as representing the creditors of the bankrupt, to stand in the place of the mortgagee as against the estate. It was also said that a great part of the property was copyhold, and that the doctrine of lien did not extend to copyholds.

For this latter position no authority was cited, and it does not appear to me to rest on any principle. When the purchase-money is not paid, the vendor is considered in this Court as having a lien for his purchase-money: what difference can it make as to the principle on which that doctrine proceeds, whether the property be copyhold or freehold — whether it pass by lease, and release, or by surrender? In questions analogous to this, copyholds and freeholds have been considered in many respects as on the same footing. It has been held, for instance (a), that the deposit of the copies of court rolls is sufficient to give a lien on the copyhold estate. There is no substance in the alleged distinction.

As to the other point, *Sharratt*, who was the person employed in the original transaction between *Winter* and *Mousley*, acted for the mortgagees, when the mortgage was made. That is constructive notice to the principal.

(a) *Ex parte Warner*, 19 Ves. 202. 1 Rose, 206.

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July 30.

TURNER v. TURNER.

In a suit instituted to enforce a pecuniary demand against the real and personal estate of a testator, an order was made by consent, referring all matters in difference between the parties in the cause to arbitration; and the arbitrators made an award, ordering the executors to pay a certain sum to the complainants, in full satisfaction of all their demands on him and his testator, but directing that certain other Defendants, who, under the testator's will, took interests in his real estate, should be at liberty to prosecute their claims against the testator's estate in like manner as if no order of reference had been made: the award was held not to be final, and was therefore set aside.

JAMES TURNER was an executor and trustee under the will of his brother *Samuel Turner*, and had taken the principal share in the management of the testator's assets. He by his will, after giving to his wife *Elizabeth* some leaseholds for years, and various specific personal chattels, devised a certain freehold estate, with all his real estates, to his son *John Beresford Turner* and *John Boycott*, and their heirs, upon trust to pay two sums of money to his wife, and certain legacies and annuities to his four daughters *Mary Guest*, *Elizabeth Hodson*, *Margaret Challiner*, and *Sarah Whitgrove*; "and — charged as aforesaid," continued the testator, "and also subject to and charged with all sum and sums of money, that shall or may remain due from me at the time of my death to any person or persons claiming against me or my property as the executor or trustee of my late brother *Samuel Turner*, (it being my will and desire that all claims and demands, if any such should be, on me as such executor or trustee, shall be a charge upon and paid out of my real estate)," — he devised his real estates to *John Beresford Turner* in fee, and appointed him, with two other persons, his executors. *John Beresford Turner* alone proved the will.

The Plaintiffs were persons entitled to legacies under the will of *Samuel Turner*, and to the residue of his real and personal estate. The Defendants were *Derrington*,
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the surviving executor and trustee under *Samuel Turner's* will; the executor of the deceased trustee and executor *James Turner*; and all the persons who, under the will of *James Turner*, took interests in, or had charges on, his real estate. The bill alleged, that *James Turner* was at the time of his death indebted in upwards of 7000*l.* to the estate of his testator *Samuel Turner*, and that he and *John Beresford Turner* had employed part of the assets in a trade of their own. The prayer was, that the debt due to *Samuel Turner's* estate might be ascertained; that, if *James Turner* or *John Beresford Turner* had employed any part of the assets in their business, they might account for the profits, or be charged with interest at 5 per cent. on the amount; that, if assets of *James Turner*, sufficient to answer the demand, were not admitted, the accounts of his real and personal estate might be taken, and that what should be found due to the Plaintiffs might be paid out of the personal estate of *James Turner*, or by the sale or mortgage of his real estate; and if his real estates were primarily liable, that such sale or mortgage might be made, before the accounts of his personal estate were taken.

Such of the Defendants, as were annuitants or legatees of *James Turner*, claimed by their answers to have their annuities secured and their legacies paid. It was suggested by some of them, that a considerable part of the balance, which was claimed on behalf of *Samuel Turner's* estate against the estate of *James Turner*, arose from an advance which was made out of the estate of *Samuel*, with the concurrence of the other executors and trustees under *Samuel's* will, to a person who had since become bankrupt.

A receiver of *James Turner's* real estates had been appointed.

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Afterwards, by a consent-order made in the cause, dated the 23d of *May* 1822, all matters in difference between the parties in the cause were referred to the determination of two arbitrators; and it was thereby ordered, that the costs of the Defendant, *William Boycott*, as between solicitor and client, should be paid by the Plaintiffs; and the question by whom such costs should ultimately be borne, and all other the costs of the suit then already incurred, and of the reference and proceedings under the same, and of the award, and of any subsequent proceeding in the suit, should be in the discretion of the arbitrators.

The arbitrators made their award, dated the 18th of *January* 1823: by which, after reciting that, having weighed the matters in the suit, it appeared to them that the sum of 6000*l.* would be a full and fair satisfaction for all the demands of all the complainants upon the Defendant *John Beresford Turner* and his late father *James Turner*, they awarded and ordered, that *John Beresford Turner* should pay the sum of 6000*l.* to the complainants; that he should also reimburse unto the complainant *William Turner* the costs, which he, *William Turner*, had paid to the Defendant *William Boycott*, and that he should pay the costs in the cause of all the Defendants, as between solicitor and client, and that the complainants should pay their own costs in the cause; and that the costs of the reference and award should be paid, one moiety by the complainant, and the other moiety by *J. B. Turner*. They further ordered, that, on payment by *J. B. Turner* of the sum of 6000*l.* and the costs, the complainants should, at his request and costs, execute and deliver unto him *J. B. Turner* a general release. The concluding clause of the award was in the following words: "And we the arbitrators do further order and award, as and touching the claims of the said Defendants *Elizabeth Turner*, *W. Henry Guest* and *Mary* his

his wife, *George Hodgson* and *Elizabeth* his wife, *John Challiner* and *Margaret* his wife, and *John Turner Whitgrove* and *Sarah* his wife, against the estate of the said *James Turner*, that they the last-named Defendants be at full liberty to prosecute the same either at law or in equity, in like manner as if the said order of reference had never been made."

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The Plaintiffs moved that *John Beresford Turner* might pay to them the sum which he was ordered by the award to pay; and the Defendants, who were interested under the will of *James Turner*, made a cross-motion to have the award set aside.

The award was impeached on the ground, that it was not final, because it did not determine the rights of the Co-defendants as between each other; and the question was, whether the award was valid.

Mr. *Shadwell* and Mr. *Knight*, for the Plaintiffs.

The only object of this suit was, to have the amount of the claims of the Plaintiffs ascertained, and to obtain payment; and when that purpose was effected, the suit would have been at an end. There were not and there could not be any questions between the Co-defendants, which could be adjusted in this cause.

Mr. *Horne* and Mr. *J. Russell*, for the Defendants.

It may be true that 6000*l.* is due from the estate of *James Turner* to the estate of *Samuel Turner*; but, according to the case suggested by one of the answers, the Co-defendant *Derrington* would be jointly liable for the greater part of the sum; and the question — whether *James Turner* alone was answerable, or whether he and *Derrington* conjointly were answerable for the whole of the

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the claim insisted on by the bill — is a question materially affecting the rights of those Defendants who took benefits under *James Turner's* will. Another question suggested by the pleadings, and arising on the will of *James Turner*, is, whether his real or personal estate is the primary fund for the satisfaction of the demand of the Plaintiffs? The award has not only omitted to dispose of the questions which previously existed between the parties, but will create new questions. Is *John Beresford Turner* to be presumed to have received personal assets of his testator sufficient to satisfy the award, and is the real estate of *James Turner* to be exonerated? Or is he to provide funds for the payment of the 6000*l.* by the sale of the real estates, on which the annuities of the Defendants are charged? Or, if he pays the money, is he to be at liberty to indemnify himself out of part of that real estate? Can it even be conjectured whether any, and if any, what part of the sum awarded has been allowed in respect of assets of *Samuel Turner*, employed, as is alleged in the bill, by *John Beresford Turner* in his own trade, and which, therefore, ought to be borne by *J. B. Turner* personally, and not by the estate of his father?

Mr. *Shadwell*, in reply.

This is in substance a creditor's suit; and the annuitants and legatees under the will of *James Turner* are parties only in consequence of their annuities and legacies being charged on his real estate. Whatever may be suggested by the answers of Co-defendants, the Plaintiff has a right to confine himself, as he has done here, simply to the satisfaction of his own demand; and if the legatees have questions to agitate between themselves, it is for them to file a bill of their own. But the award, in fact, does not affect the real estate. It ascertains the
amount

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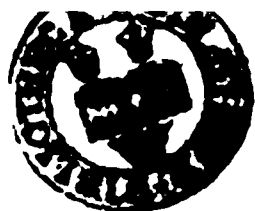
amount due from the executor of *James Turner* to the estate of *Samuel Turner*; and it directs *John Beresford Turner* to pay a specified sum in satisfaction of that debt. *John B. Turner* is the executor; and it must, therefore, be presumed, that the payments are to be made out of the personal assets, and that he has or ought to have assets in his hands sufficient for that purpose. The direction that the legatees and annuitants shall be at liberty to prosecute their claims against the estate of *James Turner*, in like manner as if no order of reference had been made, is altogether nugatory. They had that right independently of the award; and no valid award could have been made, which would have deprived them of it.

The LORD CHANCELLOR.

Considering the object of the suit, I am satisfied the intention of the order of reference was, not merely that the matters in difference between the Plaintiffs on the one side and the Defendants on the other should be determined by the arbitrators, but that the rights of all the parties to the suit should be adjusted.

The award is not final, because it does not decide on the various claims which exist between the Co-defendants.

The motion of the Plaintiffs was dismissed: and the order was made, on the motion of the Defendants, that the award should be set aside. •



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August 1, 2.

ATTORNEY-GENERAL v. MATTHEW.

At a meeting held to appoint a successor to an office in a charity, after a candidate has been elected, and a minute of his election has been entered by the clerk, it is competent for the majority of the electors, before the meeting is dissolved, to reverse their vote, rescind the minute of election, and postpone the election to a subsequent day, provided in so doing they act *bonâ fide*, and with a view to the welfare of the charity.

THE vicar, churchwardens, and overseers of the poor of the parish of *East Greenwich* had the nomination of the master of a charity school; and, a vacancy having occurred, a meeting was held to elect a successor to the office, at which the vicar, the two churchwardens, and the four overseers of the poor attended. A Mr. *Townshend* having been proposed as a candidate, three votes were given for him, and three votes against him. The vicar, according to the custom of the election, had the casting vote, and he gave it in favour of *Townshend*; and a minute of the election was entered by the clerk in the minute book.

Immediately afterwards, and before the electors had separated, it was stated that *Townshend*, being collector of the king's taxes for the parish, could not devote his time exclusively to the school, and was therefore not a fit person to be appointed. It was answered, on *Townshend's* behalf, that he would immediately resign the situation of collector. However, the vote appointing *Townshend* was reversed, and the minute of his election rescinded, by a majority of five to two; and the election was postponed to a future day. One of the electors refused to take any share in this subsequent proceeding; and another of them protested against the votes annulling the election of *Townshend*.

On a subsequent day, a Mr. *Dowsell* was appointed master.

An information was then filed, at the relation of *Townshend*, praying a declaration that he was duly elected

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elected master of the school; and a motion was made, to restrain the trustees from paying the salary to *Dowsell*.

The affidavits in support of the motion alleged, that the objection to *Townshend's* fitness, arising from his filling the situation of collector of taxes, was mentioned and discussed, before the vote electing him was passed; and that, as soon as it was mentioned, it was stated that he would resign the collectorship. On the other side, it was positively sworn, that this objection was not mentioned or discussed, till after the first vote; and the vicar and the other electors, who had originally voted for *Townshend*, but afterwards concurred in rescinding his election, swore, that their only inducement to act as they had done was regard to the welfare of the charity.

Mr. Rose and Mr. Walker, for the motion.

Mr. Horne and Mr. Sugden, *contra*.

The argument in support of the motion was, that, the election having once been made, the electors were *functi officio*, and could not reverse their vote or proceed to a new choice.

On the other side it was insisted, that the election could not be regarded as complete, while the meeting continued; and that it was competent to the electors to reconsider their first vote, provided that they acted *bonâ fide*.

The LORD CHANCELLOR was of opinion, that it was competent to the majority of the electors, while the meeting continued, to rescind their former resolution; and,

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and, the electors in this case having proceeded *bond fide*, and with a view to the welfare of the charity, his Lordship refused the motion.

August 3.

THOMAS v. MONTGOMERY.


When a legacy is not paid at the time appointed by the testator, legacy-duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee.

WILLIAM, late Duke of *Queensbury*, died on the 23d of *December* 1810, having by his will bequeathed legacies to the amount of 605,500*l.*, which he directed should be paid within three months after his decease.

Shortly after the Duke's death, a suit was instituted on behalf of the legatees; and a large fund was brought into court: but, in consequence of the complicated state in which the testator had left his property, and of the magnitude of the claims against the assets, which were insisted upon or threatened, several years elapsed before any payment could be made to the legatees; and, in the mean time, the fund, standing to the credit of the cause, was accumulating. At length in 1818, under an order dated the 14th of *August* 1817, a portion of the fund in court, which produced 189,701*l.* 5*s.* 11*d.*, was sold, and the proceeds were apportioned among the legatees. The sum, at that time due to the legatees for principal and interest, amounted to about 759,000*l.* In 1824, another portion of stock was sold, which produced 404,599*l.* 8*s.* 9*d.*; and that further sum was paid to the different legatees rateably.

On both these occasions, legacy duty was paid on the whole of the sum actually applied towards discharge of the

the legacies; but under protest that such portion, as consisted of interest, was not liable to duty, and with a reservation of the right of the legatees to claim repayment, upon the final settlement of the duties payable on the bequests.

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By the Master's report, dated the 23d of *June* 1827, it appeared that there then remained due for principal and interest on the legacies 347,828*l.* 16*s.* 3*d.*; and there was a sum of about 338,850*l.* 3 per cent. consolidated Bank annuities, which, under an order of the 14th of *June* 1827, was to be apportioned among the legatees. As the principal of the legacies given by the testator amounted to 605,500*l.*, and as duty had been paid on the two sums previously mentioned, making together 594,301*l.* 4*s.* 8*d.*, the legatees contended, that the only duty, which remained to be paid, was on the sum of 11,198*l.* 15*s.* 4*d.*, which was the difference between the principal of the legacies and the sum on which duty had been already paid: and they insisted that the duty ought not to be levied on this sum of 11,198*l.*, except in the event of the principal and interest due to them being paid in full. They therefore presented a petition, praying that the Accountant-General might be ordered to pay to them the whole proceeds of the stock which had been ordered to be apportioned among them.

The question on the petition was, Whether the duty was chargeable on the whole sum which was actually paid to the legatees on account of their respective legacies, either for interest or for principal; or whether it was chargeable only on so much of the sum paid to them as represented the capital of their legacies, and not on the sum paid in respect of the interest which had accrued due on that capital?

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Mr. Heald, Mr. Horne, Mr. Shadwell, Mr. Treslove, Mr. Rose, and Mr. Roupell, for different parties interested in opposing the claims of the legacy-duty office.

The duties, chargeable on the legacies given by this will, are imposed by the 48 G. 3. c. 149., which enacted, “that for every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will of any person who shall have died after the 5th of *April* 1803, either out of the personal or moveable estate, or out of or charged upon his real estate, &c., and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th day of *October* 1808, there shall be paid a duty after a certain rate on the amount or value thereof.” These words must be read *reddendo singula singulis*, that is, by referring the term *value* to specific legacies or general residue, which must be defined by value rather than by amount, and by referring the term *amount* to pecuniary bequests. The crown can claim only what the statute has granted: what the statute has granted is a duty of so much *per cent.* on the amount of the legacy given by the will; and the amount of the legacy is the identical sum, consisting of a certain number of pounds sterling, which the testator has directed to be paid — not that sum, with the addition of such interest as the law of this Court gives the legatee, when the legacy is not paid at the time contemplated by the will. The duty became a debt due to the crown at the end of three months from the testator’s death, subject to the contingency of diminution, if the assets should prove insufficient; it was not, however, a debt, which in itself carried interest; and there is no statutory provision which gives interest upon it: yet the claim now set up by the crown is in fact not for duty on the interest of the legacy, but for interest on the


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the legacy duty. If the assets of a testator happen to stand in such circumstances, that a long interval elapses before the duty can be paid, this is an inconvenience to which the crown must submit; and it cannot complain of being placed in the same situation with his simple contract creditors. If any improper delay occurs in satisfying the claim of the revenue, the remedy is easy; but it does not consist in allowing government 4 per cent. interest on the amount of the duty improperly withheld. The interest on a legacy is a thing totally distinct from the legacy: it is not given by the will, but by the application of a rule of equity to subsequent circumstances. So remote is it from the truth to say that this testator gave to his legatees the accumulations of interest to which they have become entitled, that interest never would have been due, if the directions of the will had been complied with; and the interest is satisfied, not out of his personal estate, but out of accumulations of dividends which never belonged to him, and did not accrue till after his death.

The *Solicitor-General* (Sir N. C. Tindal), Mr. *Bickersteth*, and Mr. *Boteler*, for the commissioners of stamps.

The doctrine contended for by the petitioners gives executors and legatees the strongest interest to delay the payment of the duty; for the greater the delay, the greater is the benefit which the legatee derives beyond that to which he is justly entitled. If, for instance, a testator bequeaths 1000*l.* to be paid to a friend at the end of a year, the legatee ought, at that time, to receive 900*l.*, and 100*l.* ought to be paid to the revenue. If the administration of the assets be delayed for five years, the sum payable in respect of the bequest will be 1200*l.*; and this sum ought to be apportioned between the legatee and the government, in the same ratio in which

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the 1000*l.* would have been apportioned: that is, the legatee ought to receive 1080*l.*, being the amount of 900*l.* with the proportion of interest produced by it; and the remaining 120*l.*, made up of the 100*l.* duty on the capital of the legacy, and the five years' accumulated interest on that sum, must belong to the revenue. But, if the duty payable out of the 1200*l.* be only 100*l.*, the legatee will have gained 20*l.* by the delay; he will, in fact, have received that increment of interest, which has arisen from the portion of the legacy which the law has declared to belong to the state and not to him, as well as the interest which is produced by the portion of the legacy which belongs to him beneficially.

The duties imposed by the 48 G. 3. c. 149., were subject to the regulations contained in the 36 G. 3. c. 52. The seventh section of that act declares, "That any gift by any will of any person, which shall by virtue of such will have effect or be satisfied out of the personal estate of such person, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form." What then has been given by the will of the Duke of *Queensbury*? Certain sums of money to be paid on a given day, and which, by the law of the land, if not paid on that day, will thenceforward bear interest at 4 per cent. Suppose the duke had directed that the legacies should be paid, not three months after his death, but at the very time, and in the very proportion in which the payments have been actually made, and that interest at 4 per cent. should accumulate on them till the time of payment arrived; it could not have been contended that the whole sum actually paid, including the accumulations of interest, would not have been liable to duty; and it can make no difference in the

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the question, whether the legatee becomes entitled to the accumulations of interest, in consequence of the testator's having postponed the payment, but directed interest to accumulate on the bequest, or in consequence of the application of the rule of the Court to the accidental postponement of the payment of the legacy beyond the time of payment prescribed by the will. In the latter case, as well as in the former, the gift in the will is the sole title of the legatee to the interest; and the interest constitutes part of the amount or value of the bequest. The accumulations of interest on the assets left by the testator are for many purposes, and for this purpose, among the rest, personal estate of the testator; or, at least, they are personal estate, which he had power to dispose of as he should think fit.

The twenty-seventh section of the 36 G. 3. c. 52. provides, "That no person, taking upon him the burthen of the execution of a will, shall pay, &c. any legacy, or any part thereof," &c., without taking a receipt in writing, expressing, among other particulars, "the amount or value of the legacy for which the receipt shall be given, and also the amount and rate of the duty payable and allowed thereon." Can it be denied, that the receipt, which the executor is entitled to require from the legatee, is a receipt for the interest as well as the principal of the legacy? and if that be so, it follows that the interest is part of the amount or value of the legacy, and that the duty attaches to it.

The eleventh, fourteenth, twenty-third, and twenty-fifth sections of the same act, contain expressions and directions, which are more or less favourable to the construction contended for by the crown, and tend to show that the actual benefit received by the legatee was what the legislature kept principally in view.

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In fact, the point has been decided by the Court, to which the cognizance of such questions most properly belongs. In the *Attorney-General v. Lord George Cavendish*(a), the Court of Exchequer held, that legacy duty was payable, not merely on the residue of a testator's effects, as it stood at the time of his death, but on the aggregate amount of the residue and of the interest accrued upon it after the testator's death up to the time when the executor and residuary legatee delivered into the stamp office a note of the amount of the residue. In this respect, there can be no distinction between residue and a pecuniary legacy. The duty is imposed on both by the same clause and in the same terms.

Mr. *Horne*, in reply.

The distinction between a pecuniary legacy and a gift of residue is so great, that the case of the *Attorney General v. Lord Cavendish* cannot be considered as applicable to the present question. The argument for the crown assumes that the duty on the legacy is a specific portion of the legacy, and that the demand in respect of it is a demand upon the fund. That is a mistake; the demand is against the executor, or if he has paid the legacy, against him and the legatee: and the sixth section of the 36 G. 3. c. 52. provides, that the duty, if not paid, shall be a debt owing to his majesty, either by the executor alone, or by both the executor and the legatee. The crown must stand upon a strictly legal right; and there are no words in any of the acts, which either give it a share of the accumulations which may be produced by the testator's assets, before they are applied in payment of legacies, or interest upon the amount of duty, which became payable to the revenue at the same time when the legacy became

(a) *Wightw.* 82.

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came payable to the legatee. In short, the argument for the crown is simply this, "The law of the Court allows legatees interest at 4 per cent. on the amount of their legacies; therefore, we ought to have interest at the same rate on a debt due to us from the executor, in respect of the assets." If such an argument could prevail, what becomes of the multitude of cases, in which simple contract creditors, at the end of many years, during which the payment of their debts had been delayed, while the assets were under administration in this Court, have asked for interest in vain, and have been obliged to remain satisfied with payment of the principal?

The LORD CHANCELLOR.

The Court took possession of the assets for the purposes of administration. The legacies were payable three months after the testator's death; and if the Court had been in a situation to have appropriated the funds then, it would have appropriated one part to the legatees, and another part to the payment of the legacy duty: for the twenty-fifth section of the 36 G. 3. c. 52. orders, "That, 'if any suit shall be instituted concerning the administration of the personal estate of any person, in which any direction shall be given touching the payment of any legacies or legacy, or the residue of his or her personal estate, the Court, in which such suit shall be instituted, shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed.'" It happened that, in consequence of certain claims at that time existing against the assets of the Duke of *Queensbury*, the Court could not say whether ultimately there would be funds which the legatees would be entitled to receive; and it therefore could not interfere in the way I have alluded to. These claims have since been disposed of; and it is the duty of the

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Court to put all parties as nearly as possible in the same situation, as if the legacies had been paid three months after the testator's death.

A certain sum has been appropriated to the satisfaction of the legatees, and the payment of the duty; for a sum appropriated for the legacies, must be considered as appropriated in part for the payment of the duty which attaches upon the legacies. It must be considered as so appropriated, from the time when the legacies were payable; at that time, a certain proportion of the appropriated sum would have belonged to the legatees, and a certain proportion of it would have belonged to the crown; and it appears to me to be the justice of the case, and not contrary to the acts of parliament, but rather consonant to their whole scope and spirit, that the legatees should have that part of the fund which they would have had, if the appropriation had been made at the time fixed by the will, and that the crown should have the full benefit of that part of the fund, which it would have been incumbent on the Court, at the same time, to have set apart for the discharge of the duty.

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SPODE v. SMITH.

August 7.

THOMAS JOHNES of *Hafod*, by his will, dated the 16th of *February* 1815, bequeathed to his wife *Jane Johnes* a leasehold messuage and premises called *Langston*, with all the household goods and furniture, plate, linen, pictures, china ware, books, and all other goods, chattels, and effects which should be in or about it at the time of his death; and also all other his household goods and furniture, plate, linen, china, books, prints, pictures, household utensils, wines, spirits, liquors, and other household stores, and all his live and dead stock: and he appointed his wife and *Hugh Smith* his executrix and executor.

If an executor, acting *bond fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4l. per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest

The testator died early in the following year; and, on the 29th of *July* 1816, the will was proved by *Hugh Smith* alone. The widow, not having acted in the execution of the trusts, renounced probate in *May* 1817.

The bill was filed by creditors of the testator for the administration of the assets. After a decree on further directions, the conduct of the suit had been taken from the Plaintiffs, on the ground that the same solicitor acted for them and for the Defendants, and had been given to other creditors; and, on the petition of these other creditors, the Vice-Chancellor, on the 20th of *March* 1826, made an order, directing that it should be referred to the Master to take an account of the personal estate of *Thomas Johnes* specifically bequeathed; and the Master

was

so be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors.

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was to inquire and state what was become thereof, and whether any and what part of such personal estate was possessed or retained by the specific legatees with the assent of *Hugh Smith*, and under what circumstances; and after the Master should have made his report, such further order was to be made as should be just.

By his report, the Master found from the examination of *Hugh Smith*, that, immediately upon the death of the testator, his widow *Jane Johnes*, who was then residing in the house at *Langston*, took possession, as specific legatee, of the household goods and other effects in and about it; that she afterwards sold the leasehold and those effects for an annuity during her life, and for the sum of 4000*l.*: that soon afterwards, possession of the personal estate and effects, which were at *Hafod House*, or on an adjoining farm which the testator had occupied, was taken on behalf of *Jane Johnes* by her sister *Eliza Johnes*, who went for that express purpose to *Hafod*, and sent some of the articles thence to the house at *Langston*: that, preparations being made for the sale of the rest of the articles specifically bequeathed, Mr. *Claughton*, who had purchased of Mr. *Johnes* the reversion in fee, expectant on his decease, of the mansion house at *Hafod*, and of Mr. *Johnes*'s other estates in *Cardiganshire*, proposed to purchase every thing belonging to *Jane Johnes* in or about *Hafod House* and the farm: that, after some discussion, *Hugh Smith*, as the agent for that purpose of *Jane Johnes*, sold to *Claughton* certain classes of the articles specifically bequeathed for 2500*l.*, which he received and remitted to *Jane Johnes*: that *Claughton* agreed to take the residue of the articles at *Hafod*, being worth from 1500*l.* to 2000*l.*, at a valuation, and they were set apart in places of security, till the valuation should be made: but that *Claughton*, having delayed to name a valuer, *Smith*, on the application of the widow, had

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had advanced her money on the credit of those articles to an amount greater than the price for which they would have been sold: that another legatee, to whom the testator had given a security on a turnpike road for a sum of 200*l.*, had been permitted to take possession of it, and had ever since received the interest; and that the personal estate and effects specifically bequeathed had been retained or possessed by the specific legatees, with the knowledge, privity, assent, and concurrence of *Smith*, the executor.

The creditors now presented a petition, praying that the report might be confirmed; that the Defendant might be charged with the value of the personal estate and effects specifically bequeathed, which, with his assent and concurrence, had been possessed or retained by the specific legatees, and with interest thereon; and that it might be referred to the Master to ascertain the amount of such value and interest.

At the date of the general report made in the cause, which was in *July* 1821, there was due to unsatisfied specialty creditors 1927*l.*; and to unsatisfied simple contract creditors 16,950*l.* The simple contract debts, which carried interest at 5*l.* per cent., were under 4000*l.* All these debts still remained unpaid.

In 1814, Mr. *Johnes* had contracted to sell to *Claughton* all his estates in the counties of *Cardigan* and *Montgomery*, for the sum of 90,000*l.*: as to part of the estates, the immediate fee was to be conveyed to the purchaser; and as to others of them, the reversion expectant on the death of Mr. *Johnes*: and 35,000*l.* of the purchase-money was to be paid in 1815, and the remaining 55,000*l.*, by instalments falling due within the three years next after Mr. *Johnes*' death. Had this contract
been

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been performed, the purchase-money, agreed to be paid by *Claughton*, would have afforded ample funds for the discharge of all the testator's debts, without resorting to the property specifically bequeathed; and, for some time after the testator's death, there was no reason to apprehend that the completion of the purchase would be resisted or delayed. Mr. *Claughton* had entered into possession of the property; had expressed himself satisfied with the title, after the delivery of the abstract; and had exercised various acts of ownership, and even advertised the estate for sale. Subsequently, however, it appeared that some of the lands were not included in the abstracts which had been delivered; objections were taken to the title to those lands; and *Claughton* refused to perform the contract. A bill for specific performance was then filed, in which the Plaintiffs insisted that *Claughton* had accepted the title; but, on the hearing of the cause in 1824, a limited order of reference as to title was made by the Vice-Chancellor. That suit was still pending: and, in the meantime, a commission of bankrupt had issued against *Claughton*.

The questions on the petition were, — Whether, in case the assets should ultimately prove insufficient for the payment of the testator's debts, the executor, *Smith*, would be personally answerable for the value of the specific legacies which he had permitted the specific legatees to possess themselves of, or to retain? and whether, while it was uncertain whether there would be a deficiency of general assets, any proceedings should now be taken with a view to his alleged contingent liability?

July 5.

The MASTER of the ROLLS confirmed the report, and dismissed the rest of the petition.

From this order the petitioners appealed.

Mr.

Mr. *Heald* and Mr. *Spence*, for the appeal.

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The personal assets actually available at the time of the testator's death, including the articles specifically bequeathed, constituted a fund, which, both at law and in equity, was applicable to the payment of his debts, and was not more than sufficient for that purpose. The executor, in giving up part of the assets to the legatees, before the creditors were satisfied, was guilty of a *devastavit*, and must be answerable to those who have been injured by his acts. The creditors had a right to immediate payment out of the first assets which were at the disposition of the executor: it was not his business to speculate on the supposition that other funds would probably come into his hands, out of which the debts might ultimately be paid; and it is altogether immaterial, whether, at the time when the legatees received their specific legacies, he had or had not just reason to suppose, that *Cloughton's* purchase-money would soon be received, and that the creditors would sustain no injury by what he then did. The specific legatees could never have been permitted to say, especially to creditors whose debts did not carry interest, "You shall wait for a dozen years before your debt is paid, in order that the articles, bequeathed to us, may remain ours in specie:" and the executor could not give the legatees, at the expense of creditors, an advantage which they could not have claimed for themselves. The delay to which the creditors have been already exposed, is a great injury which they have sustained through the act of the executor; and they have a right to charge him immediately with the amount of the assets which he has improperly parted with, in order that their debts may be forthwith satisfied, so far as the fund will extend. At any rate, he must be answerable, if there should ultimately be a deficiency of assets. Now, it is by no means clear, that there will not be such a deficiency; the probability is the other way; and if the

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the contract with *Claughton* should not be completed, the deficiency will be considerable. It is in vain to say, that, as Mr. *Smith* acted with perfect *bonâ fides*, the creditors must go against the legatees: the possession of the the legatees, with the executor's consent, is the possession of the executor. It is against the executor that the creditors have to assert their rights; and he may seek compensation from the legatees.

Mr. *Sugden* and Mr. *Simpkinson*, *contra*.

It is the duty of an executor, as far as possible, to give effect to his testator's specific bequests; and if Mr. *Smith* had applied, in payment of Mr. *Johnes'* debts, the articles specifically bequeathed by that gentleman, he would have been guilty of a breach of duty. *Clarke v. Lord Ormond* (a). In 1816, there was a moral certainty that funds would be immediately available, far exceeding the amount of the testator's debts. It did not occur to the executor, or to any of the creditors, that there could be a deficiency of assets; the very transaction of selling to Mr. *Claughton*, on behalf of the widow, a great part of the articles specifically bequeathed, was a step proceeding upon and confirmatory of the contract of 1814, the fulfilment of which would necessarily increase the personal assets by 55,000*l.* at the least. Under such circumstances, *Smith*, in allowing specific legatees to retain or possess themselves of the articles bequeathed to them, acted fairly and honestly, and without negligence or improvidence. No complaint was made against him in 1816. If such a complaint had been then made, it would have appeared most unreasonable and extravagant; and if he was not blameable at that time, he cannot be blameable now. Even if the assets should be ultimately deficient, the
deficiency

(a) *Jacob*, 108.

deficiency will have been occasioned by unforeseen and improbable events: and the creditors ought not, under such circumstances, to have any relief against the executor, who has acted with perfect honesty, and a fair degree of prudence. They ought to be left to seek their remedy against the specific legatee.

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In fact, however, there will not be a deficiency of assets; there will be funds sufficient for the payment of all the creditors; and that result will be a convincing proof, that the executor has acted properly. At all events, it is premature to take any proceedings against the executor, until it is certain that the claims of the creditors cannot be provided for otherwise.

The LORD CHANCELLOR.

I have no doubt that the conduct of Mr. *Smith* in this case was perfectly *bonâ fide*, and that, at the time when he allowed Mrs. *Johnes* to take possession of the property bequeathed to her, he was quite satisfied that there were assets sufficient to pay all the debts: and if I could see, with absolute certainty, that there will be a fund equal to the payment of the debts, I should agree entirely with the Master of the Rolls. But I do not see my way, with absolute certainty, to the conclusion, that, independently of the property specifically bequeathed, there will be a fund equal to the payment of the debts: and, if there be a deficiency of assets, I think, on the facts as they at present stand, there is enough to charge Mr. *Smith*. An account, therefore, must be directed of the value of the specific legacies which have been received by the specific legatees with the consent of the executor, and interest must be computed at 4 per cent.; unless Mr. *Smith* will give security.

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Mr. *Sugden*, on behalf of Mr. *Smith*, declined to give security.

The order was as follows: "His lordship doth order that the order, bearing date the 5th day of *July* 1827, be reversed, so far as it dismisses that part of the petition which prays that it may be referred to the Master to ascertain the amount and value of the personal estate specifically bequeathed, and interest: and it is ordered, that the Master do take an account of the value of the specific legacies received by the legatees thereof with the consent of the said Defendant *Hugh Smith*, and compute interest at the rate of 4 per cent. per annum on such value, from the time when the specific legatees possessed or received the same legacies."

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PERRY v. WELLER.

August 16.

SIR *Charles Wetherell* and Mr. *Spence* moved *ex parte* for a special injunction to restrain the Defendants from publishing a certain secret relating to what was alleged to be an important improvement in the art of instruction.

A Plaintiff cannot move *ex parte* for an injunction, after he has served the Defendant with *subpœna*, and the Defendant has appeared.

It was stated, as an objection to the motion, that the Defendants had entered an appearance.

Mr. *Spence* cited *Aller v. Jones (a)*, to shew that a Defendant could not, by appearing before the motion, prevent an injunction from issuing *ex parte*.

In answer to this it was stated (and the fact was not denied), that the Plaintiff had served the Defendants with *subpœnas*: he had thus called upon them to appear; and he could not move against them, except upon notice. In *Aller v. Jones*, the Defendant must have appeared *gratis*, before the service of *subpœna*.

The LORD CHANCELLOR.

It is true that the Defendant cannot, by his own voluntary act — by appearing *gratis* — defeat the Plaintiff's application for an injunction *ex parte*. But the Plaintiff, if he serves the Defendants with *subpœnas*, puts, by his own act, the latter in a situation which entitles them to notice of any application made against them. Under these circumstances, I cannot entertain this motion.

(a) 16 *Ves.* 605.

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August.
October 30.

Premises, held under distinct leases, ordered to be sold in one lot, upon the speculative probability arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots.

COOK v. COLLINGRIDGE.

THE question in this case arose upon exceptions to the Master's report. The circumstances are stated in the judgment.

The LORD CHANCELLOR.

This was a question respecting the most advantageous mode of dividing and allotting certain premises with a view to a sale by public auction. It came on upon exceptions to the Master's report. The Master was of opinion, that "the dwelling-houses, shop, warehouses, and buildings, with the yards and grounds forming the plant and principal accommodation of the capital coach-making concern carried on upon the said premises, and being marked as lots 5. and 6. in the plan produced before him by the Plaintiff, should, whether the same be held under one or more leases, be sold together in one lot; and that the remaining leasehold messuages and dwelling-houses, and other tenements, with their several and respective appurtenances, should be sold separately in distinct lots, each messuage or tenement, with its appurtenances, forming a lot by itself."

I have read the evidence, and agree with the Master in thinking that it will be advisable and most beneficial for all parties interested in this property, that "the dwelling-houses, shops, warehouses, and buildings, with the yards and grounds forming the plant and principal accommodation of the capital coachmaking concern carried on upon the said premises, and marked as lots 5. and 6." in the plan, "should be sold together in one lot." I think this part of the property will probably produce more, if sold together, than if sold separately in two lots. It appears to me (though the question is certainly one of a very speculative nature), that the division

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sion will not increase the competition, but may have the contrary effect. For no person, I conceive, would be willing to establish himself in the business of coach-making in these premises, with a rival in the same trade at his elbow, sharing with him the chance of obtaining the customers of the concern. It is probable, therefore, that the bidders would, even in the event of dividing the lots, be confined to those who had the means and the intention of purchasing the whole: while, at the same time, persons with capital sufficient for this purpose might be deterred from embarking in such a speculation, and bidding for the first lot, from the risk to which they might think themselves exposed either of not obtaining the second, or of being compelled, by management and by advantage taken of their situation as purchaser of the first lot, to pay for the second more than its value.

I think it not improbable, therefore, upon the whole, that the competition might be less, if the property comprised in lots 5. and 6. as marked on the plan, were sold separately, than if the whole were sold in one lot. This view of the case, however, does not apply to the rest of the property: and it appears to me that the Master has judged rightly with a view to ensuring a competition as extensive as possible, in reporting that it would be most advantageous that “the remaining leasehold messuages and dwelling-houses, and other tenements, with their several and respective appurtenances, should be sold separately in distinct lots, each messuage or tenement, with its appurtenances, forming a lot by itself.”

I understand that the parties have so arranged between themselves as to render my judgment unnecessary upon the other exception.

The Master's report, therefore, must be confirmed.

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SHEWELL v. JONES.

Quære, Whether, upon a petition objecting to a master's report of a receiver's accounts, the Court will enter into a consideration of the particular items of the accounts.

Even where there is reason to doubt whether, as to some points, the conduct of a receiver has been strictly correct, further inquiry will not be ordered, where the attention of the parties has been previously directed to the subject, and ample opportunity of investigation afforded to them.

THE facts of this case are stated in *Simons and Stuart's Reports*, vol. ii. p. 170.

From the order of the Vice-Chancellor, dismissing the petition with costs, the petitioner appealed.

Mr. Sugden, Mr. Treslove, and Mr. Knight, for the appellants.

Mr. Heald and Mr. Bickersteth, *contra*.

In the argument the charges made against the receiver were discussed at great length. The two points, upon which the principal stress was laid, were — that he had applied monies and property, belonging to the partnership, for his own benefit; and that, on behalf of the partnership, he had purchased articles from a concern which he carried on upon his own account.

The LORD CHANCELLOR.

In this case a bill was filed for the dissolution of the partnership between the Plaintiff and the Defendant.

The partnership was declared to be dissolved; and it was referred to the Master to appoint a proper person to collect and pay the debts due to and from the partnership, and to wind up the business. The person so appointed was to pass his accounts before the Master. *Howard* was appointed, and his accounts were passed accordingly.

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A petition was presented, praying that the Master might review his report, having regard to certain objections made by the petitioner; also, that certain items might be expunged from the accounts; and that the Defendant might be at liberty to exhibit interrogatories for the examination of the receiver and of witnesses in support of his objections, which it was stated the Master had refused to permit. When the case came on before *Sir John Leach* as Vice-Chancellor, that learned Judge stated that it was not the practice of the Court to enter into the consideration of the items of a receiver's account, but that the Court would, upon the petition of the party complaining, examine any principle, upon which the Master had proceeded, that was suggested to be erroneous. It was alleged that the Master had declined to enter into the merits of some of the petitioner's objections, upon a supposed want of jurisdiction. But the Master, upon a reference to him by the learned Judge, informed the Court, that the statement was incorrect, and that he had fully entered into the merits of every objection taken by the petitioner. The petition was accordingly dismissed. It was afterwards brought here for further consideration, and discussed at great length.

I certainly do not feel disposed to dissent from the rule of practice with respect to receivers' accounts stated by the late Vice-Chancellor. But, had the rule been otherwise, I think, after a careful perusal of the affidavits, I should not be justified in sending this case to the Master for further investigation. The impression, which a careful perusal of the affidavits has made upon my mind, and the conclusion I have drawn from them, is, that the persons interested in the estate in question are under great obligations to the receiver for his activity and exertion. The charges preferred against him have, I think, in general been sufficiently and satisfactorily

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answered.

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answered. There are only two points upon which I have hesitated — the one as to the discount of bills by the receiver, for his own convenience — the other, as to the purchase of flax from *Howard* and Co. But, after the ample opportunity which was afforded for inquiry, while this case was before the Master — a period of more than three years, when every thing connected with these transactions might have been sifted and examined — the extensions of the time for producing evidence — the examination of the receiver himself upon interrogatories as far back as the year 1821, one of which interrogatories was directed to the very point of the discount of the bills; adverting also to the statement made by the Master, that he entered fully into the merits of every objection urged by the petitioner — and attending to the whole course of the proceeding, as collected from the affidavits, — I think the inquiry ought now to terminate, and that there is no reason for submitting the case for further examination. As to the application to the Master to permit a further examination of the receiver and of other witnesses upon interrogatories, it was made at so late a period as completely to justify the Master in his refusal.

I think, therefore, the petition must be dismissed.

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BACON v. WILLIAMS.

Aug.
Nov. 3.

THE circumstances of this case are stated in
1 *Simons and Stuart's Reports*, 415.

The motion for a new trial, on behalf of the rector, having been refused by the Vice-Chancellor, a similar application was now made before the Lord Chancellor.

Mr. *Shadwell* and Mr. *Treslove*, in support of the motion for a new trial.

Mr. *Heald* and Mr. *Merivale*, *contra*.

The LORD CHANCELLOR.

This was a motion for a new trial of an issue directed by the late Vice-Chancellor, to try "whether Mr. *Phillipps* was entitled to the tithes, or to a modus of 4*l.* 10*s.* payable yearly in lieu of tithes, of certain lands called the *Cliffe Slades*."

On the part of Mr. *Phillipps*, there was produced on the trial a deed dated in 1670, by which "all that rate tithe of 4*s.* yearly increasing, renewing, or happening out of certain grounds in *Markfield*, called *Cliffe Slades*," was conveyed to *Thomas Boothby*. The title to this payment was deduced by a regular series of conveyances from *Boothby* to Mr. *Phillipps*. In some of the deeds the payment was stated at 4*s.* 8*d.*, in others at 4*s.* 10*d.*; in some it was called the tithe or rate-tithe. The deeds from 1695 to 1756 stated the payment at 4*s.* 10*d.* The place in question contained somewhat more than

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100 acres.

Though mere nonpayment of tithes, for however long a period, would not be evidence of a grant, yet a layman's adverse enjoyment or pernancy, for a long series of years, of the tithes of certain lands, or of a money-payment in lieu of tithes, coupled with a succession of deeds by which the tithes or money-payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes.

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100 acres. As far back as the memory of living witnesses extended, a period of more than fifty years, the payment of 4s. 10d. had been regularly collected from the different occupiers for Mr. *Phillipps* and his predecessors. No tithes for this land had been paid to or claimed by the rector.

It was contended, upon the motion for the new trial, that it was necessary either to produce a grant of the tithes, or to give some evidence of a grant having existed, to justify a verdict against the rector; and that, there being, as it was said, no such evidence in this case, the jury ought to have been directed to find for the Defendant in the issue, who was the Plaintiff in the cause. Several cases were cited: *Scott v. Airey* (a); *Edwards v. Lord Vernon* (b); *Fanshaw v. Rotherham* (c); *Berney v. Harvey* (d); and *Meade v. Norbury*. (e)

From the statement made of the summing up of the learned Judge, it appears that he drew a distinction between the mere non-payment of tithes, which would not, he said, be an answer to the claim of the rector, and such a case as the present; viz. of the actual per-nancy of the tithes, or of a payment in lieu of them; and that he thought, as this might have a legal origin, the successive conveyances, and the enjoyment accruing under them for a period of one hundred and fifty years, were sufficient to justify the jury in presuming a grant. In this opinion I concur with the very learned Judge by whom the issue was tried; although I think it is to be regretted that this question should have come in such a shape, as to render it necessary that a court of equity should be called upon to decide it.

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(a) *Gwillim*, 1174.

(d) 17 *Ves.* 119.

(b) *Gwillim*, 1177. note.

(e) 2 *Price*, 338. 3 *Bligh*, 211.

(c) 1 *Eden*, 276.

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The authorities, which were referred to in the argument, do not appear to me to be at variance with the direction of the learned Judge. In *Scott v. Airey*, which has often been referred to in the progress of this cause, the tithes had been the subject of sale and conveyance for 170 years, and there had been a correspondent enjoyment of them by the parties to whom they were so conveyed. In that case the Court refused to direct an issue, and left the rector to pursue, if he should think proper, his remedy at law. The case of *Edwards v. Lord Vernon* appears to have been to the same effect. In these cases the Court did not determine the right; it merely refused to interfere. But in the former of these cases, the same distinction was taken between “a mere claim of exemption from tithes, and the claim,” as in this case, “of the tithe of land which had constantly paid tithes.” And Mr. Baron *Eyre*, who, according to the report, took a leading part in the decision, stated, that there was a great difference between a claim founded on mere non-payment of tithes, and a claim supported by evidence of actual enjoyment of the pernancy of tithes. “The title,” he added (a), “not being simply unlawful, long possession is evidence of the title.” The law was so put to the jury by the learned Judge upon the trial of the present issue. The case, therefore, of *Scott v. Airey*, not only is not an authority against the direction, but, as far as the opinion of one of the learned Judges is considered, may be cited in support of it.

In the case of *Fanshaw v. Rotherham*, as reported (b), Lord Keeper *Henley* intimates, that, though in the case of a severance, it is not necessary to produce the deed, evidence must be given that there was one; adding, “that the law requires only the best evidence that the thing in dispute will admit of, and a very slight

(a) *Gwillim*, 1176.

(b) *Eden*, 297.

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slight proof would be sufficient to establish such a deed of severance though it were lost; but that a title could not be set up at law against the common right by length of possession of the tithes, or by simple grants of them, or by both together." But the learned Judge was speaking of a case of exemption or discharge. "I am of opinion," he says (a), "that at common law no man could avail himself of a discharge from tithes by grant, but by producing it." And though the expressions used are general, it may, I think, from the general scope of his argument, admit of doubt, whether he intended to apply them or would have applied them to a case like the present, of long adverse enjoyment, and actual pernancy of tithes, coupled with a succession of conveyances, corresponding with such enjoyment. And it should further be observed, that the argument, as reported in *Gwillim*, is entirely confined to a case of exemption. In *Berney v. Harvey*, Lord Eldon, speaking of *Fanshaw v. Rotherham*, observes (b), "that the doctrine of the Court in that case was, that a mere retainer, unexplained by any deed or instrument asserting title not merely to retain but to enjoy, is not a defence against a spiritual person or a lay impropriator." And the same learned Judge, observing upon *Scott v. Airey*, said, the Court took this distinction, "that, if we had nothing to shew but the mere retainer of the tithes, not an actual grant or pernancy, or that we had in our title-deeds treated the property as belonging to us, the mere retainer would not raise the presumption against any one; not against a spiritual rector; nor, upon *Fanshaw v. Rotherham*, against a lay rector."

The case of *Meade v. Norbury* (c), was a case of mere non-payment. In that case (d), Mr. Baron Richards,
in

(a) 1 *Eden*, 294.(b) 17 *Ves.* 127.(c) 2 *Price*, 539. 3 *Bligh*, 211.(d) 2 *Price*, 545.

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in giving judgment, observed, "In other cases the perception has been of that sort which could not have been lawful without grant; but here the sole question is, whether non-payment is evidence of grant." And Chief Baron *Thomson* said (a), "As to the authorities which have been cited, where the doctrine of presumption has obtained, I make this observation: — In all those cases the defence was, an actual enjoyment of tithes, and not a mere retainer." And speaking of the case of a grant, he says, "Mere non-payment would not be evidence of such a grant." It must be shewn that the grant did exist by other evidence than mere non-payment. "Retainer alone amounts to nothing more than *non decimando*."

I think, therefore, that the doctrine in the cases, which were cited at the bar on the part of the rector, is not at variance with the opinion expressed by the learned Judge upon the trial of this issue: and I agree with him in thinking, that the mere non-payment, for however long a period, would not be evidence of a grant; but yet, that the adverse enjoyment or pernanacy of the tithes for a long series of years, coupled as in this case with a succession of deeds by which the title has been conveyed from one person to another, and corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. In the present case, indeed, the tithe itself was not received, but the payment was made, as it appears, in lieu of tithes, and the jury have found that it was a *modus*. The case, therefore, is in principle the same, though, perhaps, not so strong in point of evidence, as if the tithe itself had been paid. The term "rate-tithe" seems to have been used with reference to the practice of apportioning the tithe among the different occupiers.

Upon a view of the whole case, I think the motion for a new trial cannot be sustained.

(a) 2 *Price*, 363, 364.

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1827.
Aug. 3.1828.
Aug. 5.

BETWEEN

The ATTORNEY-GENERAL, at the Relation of
the Inhabitants of the Town of MONMOUTH,
Informant;

AND

The Master and Four Wardens of the HABER-
DASHERS' COMPANY, Defendants.

Provision for
giving instruc-
tion in writing
and arith-
metic, intro-
duced into a
scheme for the
administration
and manage-
ment of a free
grammar
school.

IN this suit a petition was presented by the master and wardens of the Haberdashers' Company for the purpose of having the appointment of a master to teach writing and arithmetic made part of the scheme for the administration of a free grammar school.

By letters patent of King *James* the First, dated the 19th *March* 1614, reciting that *William Jones*, citizen and haberdasher, of *London*, was willing to give divers hereditaments for the foundation and maintenance of an almshouse and free grammar school, and a preacher, in the town of *Monmouth*, his majesty, at the petition of the said *William Jones*, did grant and ordain, that in future for ever there might and should be in the town of *Monmouth* an almshouse for poor people and *one free grammar* school for the instruction and education of boys and youths *in the Latin tongue* and other more polite literature and erudition, and that the said school should thenceforth for ever be called 'The free grammar school of *William Jones* in *Monmouth*,' and should consist of *one schoolmaster and one undermaster*. The same instrument established a lectureship, and appointed the master and four wardens of the Haberdashers' Company, and their successors, "governors of the pos-
sessions,

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^{v.}
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ERS' Co.

sessions, revenues, and goods of the almshouse and free grammar school of *William Jones in Monmouth*," constituting them for that purpose a body corporate, and investing them with the usual powers: and it ordained that all issues and revenues of lands to be given and assigned for the maintenance of the almshouse, school, and preacher, should be expended in the sustentation and maintenance of the poor people of the almshouse, of the master and under-master of the school, and of the preacher, and in repairs of the lands and possessions of the charity.

William Jones by his will, bearing date the 26th day of *December* 1614, (amongst other things) bequeathed as follows:—

"*Item.*—I give to the Company of Haberdashers in *London* the sum of 9000*l.* of current money in *England*, to ordain and purchase a free grammar school and almshouses for twenty poor old diseased people, or blind and lame, as it shall seem best to them, of the town of *Monmouth*, where it shall be bestowed. Of this 9000*l.* 6000*l.* is already paid to the Company of Haberdashers; so there remaineth yet 3000*l.* to be paid unto the Company of Haberdashers by my executors within a year after my decease, which sum given to this purpose is sterling money 9000*l.*"

In *February* 1614, *William Jones* died. The Haberdashers' Company had received the sum of 6000*l.* prior to his death; and, the remaining 3000*l.* having been afterwards paid by his executors, the charity was carried into execution, and the school established.

The present petition stated that the annual income of the charity lands was 779*l.* 10*s.* 6*d.*, and the annual expendi-

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expenditure on an average; 735*l.* 12*s.* 2*d.*, leaving an average annual surplus of 43*l.* 17*s.* 11*d.*; that there was standing in the name of the Accountant-General, in trust in the cause, 6362*l.* 18*s.* 8*d.* three per cent. consols, arising out of the surplus rents and profits, with the accumulations, which, up to that time, had been set apart for the payment of the expenses of repairs, costs, and other contingencies; that the annual surplus of 43*l.* 17*s.* 11*d.*, and the sum of 6362*l.* 18*s.* 8*d.* 3 per cent. consols, were much more than sufficient to provide for such repairs and contingencies; that a considerable portion of the surplus income might be safely applied in making some addition to the present establishment of the charity; that, for several years past, there had not been at the school, on an average, above twenty scholars, and there were then only sixteen, although the statutes authorised the admission of a hundred; that the statutes contained a direction that the school should, once at least in each year, be visited by men of good conscience and judgment, to be appointed by the governors; and that, in pursuance of such direction, the present governors, in the year 1825, appointed, as such visitors, nine gentlemen in the neighbourhood of *Monmouth*, who inquired into the state of the school, with a view to ascertain whether any thing could be done to increase its utility. As the result of that inquiry, they had stated to the petitioners their opinion, that the great defect in the school, and the reason of its comparative inutility, was the want of some provision for the instruction of the boys in writing and arithmetic and the common branches of education, at the same time that they were pursuing their classical studies; that it would most essentially promote the objects of the founder of the charities, and be highly conducive to the interests of the school, as a classical school, if a writing master, at an annual salary, were appointed, or some other provision

vision made for instructing the scholars in writing and arithmetic at *extra* hours, so as to promote and not interfere with their classical studies; and that, if such provision were made for instructing the scholars in writing and arithmetic, in addition to the classical part of their education, leaving the classics still the principal object of attention, the scholars would very shortly amount to the full number allowed by the statutes. The petition added, that the opinion of the visitors had been very strongly confirmed by representations which had been made to the petitioners by many of the most respectable inhabitants of *Monmouth*.

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The prayer was, that it might be referred to the Master to inquire and state to the Court, whether any and what portion of the funds of the charity could be applied in making any addition to the existing establishment, without diminishing the present salaries and allowances, and still reserving a sufficient fund for repairs and other contingencies; that the Master, if he should find that part of the funds could be so applied, might approve of a scheme for the application of such portion of the funds; that he might inquire, whether the school, as a free grammar school, would be rendered more extensively useful in the manner and for the purposes intended by the founder, by adding to the present establishment some provision for the instruction of the boys in writing and arithmetic; and if he should be of opinion that such additional provision would render the school more extensively useful, then that he might, in the scheme to be approved of by him, include a provision for such additional instruction.

The only doubt was, whether, consistently with the rules of the court, part of the funds belonging to this free grammar school could be applied in providing for the

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the scholars the means of instruction in writing and arithmetic. *

Mr. *Swann*, for the petition, stated, that what was now prayed was sanctioned by what the Court had done

1825.

Dec. 23.

Provisions for instructing the boys in writing and arithmetic made part of the scheme of a grammar school.

* ATTORNEY-GENERAL v. DIXIE.

Sir *Wolstan Dixie* by his will and codicil, dated respectively in 1592 and 1593, gave a sum of money for the endowment and establishment of a school "for the bringing up and teaching of fifty or three score poor scholars." The school was to be under a good and learned master: boys educated in it were to have a preferable claim to certain fellowships and scholarships, which the testator had founded in *Emanuel College, Cambridge*: and the codicil stated the purpose of the bequest to be "for the maintenance and increase of learning and good acts."


The nephew and heir of the testator made an addition to the endowment; and, in the forty-third year of the reign of *Elizabeth*, he obtained letters patent establishing "one perpetual grammar school for the instruction, education, and bringing up of boys and young men within the village or parish of *Market*

Bosworth, according to the orders, statutes, and constitutions in that behalf thereafter to be made and ordained to continue and endure for ever."

In 1630, he made certain statutes for the government of the school. The first of these provided, "that in the said school in *Market Bosworth* there shall be for ever successively a schoolmaster and an usher, who shall with all care and diligence instruct and teach the children and youth, and that to be done freely, of the parish of *Bosworth* and *Cadeby*, and the kindred of the said Sir *Wolstan Dixie*, citizen, and late mayor of *London*, and their heirs, and the children of the tenants or occupiers of the school lands, in learning and good nurture: the master to be of a degree of a Master of Arts, and the usher, of a Bachelor of Arts, at the least."

The school was to be divided into two branches, the lower

done on a former occasion. By a report dated the 25th of *July* 1797, the Master found, that, in 1784, the rents of the charity estate being then considerably increased,

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lower school and the upper. "In the first form of the lower school," said the statutes, "shall be taught the A. B. C., primer, Testament, and other *English* books." In the other form of the lower school *Latin* was to be taught. In the upper school the instruction was confined to *Latin*, *Greek*, and *Hebrew*: and the scholars were prohibited from speaking *English* in the school.

Great abuses having grown up in the administration of the charity, an information had been filed, and a decree made, under which new governors had been appointed. (a)

As the income of the school had greatly increased, the governors now presented a petition, stating that the inhabitants of the parish of *Bosworth* and *Cadeby*, being, with few exceptions, in humble circumstances, had neither pecuniary means nor local opportunities of procuring for their children such instruction in *English*, writing, and arithmetic, as might qualify them for entering with advantage upon the study of

the learned languages; that the original founder of the charity did not, by his will, confine the objects of the school to instruction in the learned languages, but seemed to have intended to further education generally; that the statutes of the school seemed to contemplate the extension of the scheme of education, which was to be given in it, to other branches of knowledge besides the learned languages, one of the statutes having provided, that, "in the first form of the lower school, shall be taught the A. B. C., the primer, Testament, and other *English* books;" that, in former times, there had been a writing master attached to the establishment, as well as a master and usher; and that, unless a good and effective plan of education in *English*, writing, and arithmetic formed a part of the scheme for the administration of the charity, there would not be a succession of scholars qualified for prosecuting the study of *Latin* and *Greek*, and the school would become ineffectual

(a) 13 *Ves.* 519.

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creased, the Haberdashers' Company, on a representation made to them by the gentlemen who were visitors of the school, and resident in or near *Newport*, of the necessity

fectual as a place of instruction in the learned languages, as well as useless to that district, for the education of youth within which it was intended by the founder. The prayer of the petition was, that, in the scheme for the future administration of the charity, provision might be made for instructing the boys in *English*, writing, and arithmetic.

Mr. *Hart* and Mr. *J. Russell*, for the petition.

Mr. *Barber*, for the relators.

ELDON, LORD CHANCELLOR, made an order, that the Master should inquire, how far any provision for instructing the children of the parishes of *Bosworth* and *Cadeby*, and of the tenants or occupiers of the school lands in *English*, writing, and arithmetic, would be consistent with the due execution of the charity, as founded by the testator, and in furtherance of that object; and the Master, in settling a scheme for the school, was to have regard to the result of

that inquiry. His Lordship also directed, that the heir at law of the founder (he was a party to the suit) should be served with warrants in prosecuting the inquiry.

The governors proposed before the Master a scheme, in which provision was made for instructing the scholars in *English*, writing, and arithmetic.

The Attorney-General appeared before the Master separately from the relators, and opposed the scheme as tending to alter the nature of the institution.

The Master approved of the scheme proposed by the governors, with only a few alterations in matters of detail. It provided that there should be an usher, whose sole occupation should be to instruct the scholars in *English*, writing, and arithmetic, from the most elementary of such branches of education upwards, and who should receive out of the school funds a salary of 70*l.* a year, besides 20*l.* for a house; and that

necessity and great utility that would attend the appointment of a master for the purpose of teaching the scholars writing and arithmetic, appointed a master for that purpose at a salary of 20*l.* per annum, which the Master (Mr. *Leeds*) was of opinion was a proper appointment, and ought to be continued: and he increased the salary of the writing-master from 20*l.* to 30*l.*, the salary of the schoolmaster being at that time 90*l.*, and the salary of the usher, 50*l.* a year.

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Mr. *Pemberton*, for the Attorney-General and the relators, did not offer any opposition.

The LORD CHANCELLOR made the order according to the prayer of the petition.

Aug. 3.

The Master reported that he was of opinion that a portion of the funds of the charity could be applied in making the addition after mentioned to the existing establishment, without diminishing the salaries and allowances already payable thereout, and after reserving a sufficient fund for repairs and other contingencies, and that the school belonging to the charity as a free grammar school, would be rendered more extensively useful in the manner and for the purposes intended by the founder, by adding to the present establishment some provision

that, in allotting the hours of attendance in school, care should be taken to give the boys, who were prosecuting the study of the learned languages, opportunity to have the benefit of the instruction thus provided in *English*, writing, and arithmetic.

The report was confirmed; and the scheme was carried into effect under the order of the Court.


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provision for the instruction of the boys educated at the school in writing and arithmetic. And he was also of opinion, that a competent and respectable person should be forthwith and from time to time appointed by the Defendants for the purpose of teaching the boys belonging to the charity school writing and arithmetic for two hours in each day, viz. one hour in the morning, and one hour in the afternoon; that the annual sum of 60*l.* should be allowed such person for his care and pains in such instruction; and that the same should be paid out of the dividends arising from the sum of 6571*l.* 19*s.* 3*d.* three per cent. consols, the then amount of the accumulations of the charity fund.

1828.
Aug. 5.

The report was confirmed, and the sum of 60*l.* was ordered to be paid yearly to the writing-master.

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RAWSTONE v. PARR.

Feb. 10, 11.


THE facts of this case are stated in the judgment of the Master of the Rolls, reported in a former part of this volume. (a)

An appeal was presented against the order of the Master of the Rolls.

The *Solicitor-General*, Mr. *Pemberton*, Mr. *Spence*, and Mr. *Bligh*, in support of the appeal, cited the cases referred to in the former argument, and *Underhill v. Horwood* (b), *Davis v. Symonds* (c), *Ex parte Kendall*. (d) They contended that a court of equity never interfered to give a remedy which did not exist at law, against the assets of a deceased co-obligee, except in two classes of cases: the one, where the intention of the parties was that the obligation should be joint and several, though from mistake the instrument had been drawn so as to be joint only; the other, where the written instrument did not create the original liability to pay, but credit had been previously given to the several persons who entered into the obligation, or an antecedent debt or duty was owing by them, which rendered them liable to pay independently of the written obligation. *Sumner v. Powell*. (e) The present claim did not come within either of these classes. There was not a pretext for saying

(a) Pages 424—427.

(b) 10 *Ves.* 209.(c) 1 *Cox*, 402.(d) 17 *Ves.* 514.(e) 2 *Mer.* 30.

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saying that any previous credit had been given to *Parr*, or that any previous claim against him existed, which would have entitled the creditor to equitable relief against his assets. The demand stood solely on the written instrument; and there was no evidence that the intention of the parties was, that the tenor of that promissory note should be other than it was. *Parr*, indeed, was described in it as surety. But why was it to be inferred, that, because he was surety, he was to be liable not merely jointly, but also severally. The joint liability imposed on him by being a party to the note, was a liability which he undertook as surety; but the character in which he undertook the liability did not alter its nature or extent. If the note was to be considered as several with respect to *Parr*, was it to be considered several also with respect to each of the *Ewings*? Could it have been the intention of the parties that the creditor should have a right to call upon *Parr* to pay the promissory note in the first instance?

Mr. *Rose*, for the respondents, urged the same topics which had been insisted on before the Master of the Rolls: and he further contended, that on the principle of *Gray v. Chiswell* (a), and *Cowell v. Sikes* (b), *Oldham and Co.* were entitled, even if the note were considered as creating merely a joint obligation, to have their demand satisfied out of the assets of *Parr*. *John Ewing* was bankrupt: *James Ewing* was insolvent, and had left the country; and it could not be suggested, that there were joint assets of *Parr* and the *Ewings*. The estate of *Parr*, therefore, must satisfy the debt: and his personal representative would have a right to the benefit of the proof, which might be made in respect of the note under the commission of bankrupt against *John Ewing*.

The

(a) 9 *Ves.* 118.

(b) 2 *Russell*, 191.

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The claim made against the estate of *Parr*, is in respect of his being one of the makers of the promissory note; and his estate can be liable only on the assumption, that there was a mistake in the form of the note, and that, in signing as surety, he meant to be severally liable, if the *Ewings* did not pay. Now there is nothing to satisfy me, that, if the attention of the parties had been drawn to the circumstance, the creditor would not have been satisfied with the security derived from *Parr's* becoming jointly liable with the *Ewings*.

But if any argument in favour of presuming a mistake were to arise out of the circumstance that *Parr* is joined as surety, how is the supposed mistake to be rectified? It is said, it may be rectified by making the note joint and several. The effect of making it joint and several would be, that it would not have been necessary for the creditor to sue the *Ewings* in the first instance, and that he might have proceeded against *Parr* alone, without even joining the *Ewings* in the action. But if *Parr* signed merely as surety, and if effect is to be given to the contract of suretyship, he would not be liable except on the default of the principal debtors. If, therefore, the instrument is to be altered on the ground of its not having carried the intention of the parties into effect, I cannot satisfy myself that their intention would be carried into effect by making it joint and several.

I see no ground for saying that any thing more was intended than that *Parr* should be jointly liable: and I cannot alter the instrument on conjecture. The judgment of the Master of the Rolls must be reversed; and the exception overruled.

of being subsequently divested, if his mother died without leaving issue.

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The LORD CHANCELLOR.

The testator gave his property to trustees, who were to lay it out on securities. After the death of his wife, his daughters *Jane* and *Eliza* were to receive the interest; and a yearly sum of 200*l.*, which was to come out of *Eliza's* share, was to be paid to his grandson *Edmund*, when he attained twenty-one. As to the principal, his daughters were to have a power of disposing of it among their children or grandchildren; and, in the event of either of them dying without issue, the fortune of the one so dying was to go to the survivor, her children, or grandchildren. But with respect to *Eliza's* moiety, there was expressly excepted from her power of appointment a sum of 4000*l.*; "which sum," says the testator, "shall be my grandchildren's property." That strong expression, connected with the circumstance that the 4000*l.* is excepted from *Eliza's* power of appointment, leads me to the conclusion, that the 4000*l.* vested in *Edmund Worthington Livesey*, though it was not payable till his mother's death.

I do not find any words in the will adverse to this conclusion. The only passage, which has been relied on as leading to a contrary construction, is the concluding clause, which describes the property, which either daughter, in the event of her dying without issue, has power to dispose of, as the "moiety" of the fund. But the same clause states that such "moiety is to be subject to the restriction, limitation, and distribution aforesaid:" and the addition of these terms satisfies me,

N n 4

that

APPENDIX.

SCOUGALL v. CAMPBELL. *

THIS was an application by one of three Co-plaintiffs for the taxation of a solicitor's bill of costs.

In 1807, *Scougall* and Co. merchants in *Scotland*, employed *Kaye* and Co. as their solicitors in *London*, to conduct certain suits in equity and proceedings at law against the Defendants *Campbell* and Co. In 1814, a sequestration was issued, according to the law of *Scotland*, against the firm of *Scougall* and Co., and against *Scougall* and *Bett*, two of the three partners who com-

A bill of costs was delivered by the solicitor in 1809, and shortly afterwards paid by the client: between that time and *March* 1817, four other bills of costs were delivered, and various payments were made on ac-

posed
count: in *November* 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating, that he would insist on having the bills taxed; an application for taxation to a Judge at law in 1818, and an application to the Court of King's Bench in 1819, failed, from circumstances not involving the merits of the question: some attempts at a compromise were made from time to time; and the client was obliged on three or four occasions to leave *England*, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper: the Court ordered that the bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the Master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the Master should exercise as large a discretion as he might think fit with respect to the evidence on which he should proceed in forming his judgment concerning these items.

* This and the following cases were decided by Lord *Eldon*. Accidental circumstances prevented their insertion in the Second Volume.

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posed it; but an arrangement was entered into with the third partner, Mr. *Stead*, who resided in *England*, by which the trustee and the commissioners under the sequestration re-assigned and assured to him the claims and demands against *Campbell* and Co., which it had been the object of the actions and suits to enforce.

Messrs. *Kaye* and Co. continued to act as Mr. *Scougall*'s solicitors down to *November* 1817. During this period they delivered to him six bills of costs, amounting in the whole to upwards of 2370*l.* The first was delivered in the autumn of 1809, and was paid in full; the second, in the autumn of 1812; the third, in the autumn of 1814; the fourth, in *April* 1815; the fifth, on the 31st of *March* 1817; and the sixth, in *November* 1817. After the payment of the first bill, Mr. *Stead* paid to Messrs. *Kaye* and Co. various sums on account; and, in *November* 1817, they claimed the sum of 779*l.* 17*s.* 9*d.* as the balance due to them. At that time Mr. *Stead* had determined to employ another solicitor; and, in order to obtain possession of the papers necessary for carrying on the proceedings in law and equity, he paid that balance on the 26th of *November* 1817; stating, at the same time, that it was his determination to have the bills taxed, and to insist on the repayment of such deduction as might be the result of the taxation.

Some attempts were then made to settle the matters in dispute between Mr. *Stead* and Messrs. *Kaye* and Co. by submitting them to a respectable solicitor; and these having proved ineffectual, Mr. *Stead*, in *December* 1818, took out a summons to obtain a Judge's order to tax the bills: but the application failed, apparently from circumstances not at all connected with the merits of the case. In *Hilary* term 1819, a motion was made in the
Court

Court of King's Bench for the taxation of the bills; it stood over for some time; the negotiations for an amicable arrangement were renewed; Mr. *Stead* did not press his motion, principally, it would appear, because, the rule of the King's Bench not permitting affidavits to be filed in reply, he could not fully meet the case which Messrs. *Kaye* and Co. had stated in their affidavits; and the rule, which he had obtained, was finally discharged with costs.

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v.
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A few weeks afterwards Mr. *Stead* left *England* for *Norway*, where he remained till the end of the year: in 1820 he was compelled to go twice to the Continent on urgent business; and he then went to *Norway* a second time. After his return, he took steps with a view to effect the taxation of the bills; but considerable delay was occasioned by the difficulty which he swore he had experienced in finding a solicitor who would undertake the task.

In *January* 1824, notice was served of a motion before the Lord Chancellor for the taxation of the bills; and, the pressure of business having prevented its being brought on before his Lordship, it was at last made before the Vice-Chancellor.

The affidavits in support of it alleged, that the bills contained many unfair and exorbitant charges; and specified many items which were represented as not being sanctioned by the custom of the profession or the rules of the Court.

Mr. *Knight*, for the motion.

Mr. *Shadwell*, *contra*.

The

Mr. *Ching* and Mr. *Knight*, for the motion.

Mr. *Shadwell*, *contra*.

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The topics urged in support of the motion were, that the period of time, which had intervened, was not such as to exclude the client from his right of taxation; that the delay, even if it had been much longer, was accounted for by the circumstances of the applicant; that the exorbitancy of many of the items was so great as to amount to fraud; that some of the charges were for business which had never been done, and for disbursements which had never been made, and were therefore directly fraudulent; and that neither payment by the client nor his acquiescence would protect such bills from taxation.

On the other hand, it was argued, that the charges were, on the whole, fair and reasonable; that bills of costs, which had been settled, would not be opened, merely because they contained charges which might probably be cut down on taxation; that five of the bills had been delivered between 1809 and *March* 1817, and no complaint had been made at the time; that, after so many years had elapsed, and when two attempts to tax the bills had failed, the solicitor could not be expected to be in possession of that evidence to establish the various particulars of his demand, which he could have furnished, had it been required at an earlier period; and that, in particular, he was now deprived of the evidence of a clerk, who could have proved many of the disbursements, which were now disputed, to have been actually made.

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In reference to a topic which has been alluded to in the argument, I will say that, if any solicitor tells a client before hand, that he will not undertake his business, if his bill is to be taxed; or if any solicitor, in the progress of a cause, gives his client to understand, that he will go on with it or not go on with it, according as his bills are to be taxed or not to be taxed, I think it my duty to say, that the judges of the land will not permit him to be a solicitor in any other cause. I do not believe that any judge would allow a solicitor, who had so acted, to continue on the rolls: and I will not permit it to be intimated, that a solicitor will act, if his bills are not to be taxed, but will not act, if his bills are to be taxed.

With respect to the particular nature of the application now before me; has there ever been a case in this Court, where, after a long period has elapsed since the payment of a bill of costs, taxation has been ordered, unless there was evidence on oath, that the bill contained such and such charges, which would not be allowed as between solicitor and client? Where the application is open to the objection of staleness, you must meet the objection by shewing that the charges in the bills are open to specific objections; and in such cases it must be made out, by the evidence of professional men, that there are in the bills improper and fraudulent charges.

Affidavits of solicitors were filed, stating many of the charges to be exorbitant and improper. There were counter affidavits in support of the charges in the bills of costs; but they did not meet fully every part of the case made by the Plaintiff.

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The case was again argued.

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Unless the impression on my mind be erroneous, what was done in *November* 1817 amounted to no more than this,—that Mr. *Stead* paid the bills of costs, under a protest that payment was not to prevent taxation, and that his papers were then delivered over to him. If that were so, it was a matter of course that he might have applied for an order of taxation to any of the king's courts, where the whole or any part of the business had been done. If he has thought proper not to call for taxation, and such a length of time has run out as renders it difficult to do justice to the solicitor, it is owing to himself that taxation cannot be called for. Here, however, an application was made to the Court of King's Bench; and that application did not miscarry, but was withdrawn, in consequence, as it would appear, of a sort of proposal that the bills should be submitted to the examination of a particular solicitor, who, for this purpose, was to stand *in loco magistri*. At that time it would have been a matter of course that the bills should be taxed; and it would not have been necessary to have pointed out this or that item of overcharge. The protest, made when the balance was paid, would have amounted to a dispensation from pointing out particular items which might be quarrelled with.

At last the proposal of arbitration was abandoned; and then the question would be, whether, making allowance for the frequent absence of the party from the kingdom, he might not apply to the Court for taxation upon the general ground. An application was made to the Vice-Chancellor, and was refused; and if the case stood before the Vice-Chancellor, in this view of it, as it now stands

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stands before me, — nothing having passed which would prevent the application being now made, as it might have been made originally, regard being had to the nature of the transactions which have passed, — then I say it was nothing more than the ordinary application to Court for the taxation of the bills, to be dealt with exactly as it would have been dealt with, when the first application was made.

It is very true, as has been stated, that at this distance of time there may be difficulties in taxing the bills. But if those difficulties exist in a case constituted with circumstances such as I have been stating, it must be remembered that it is not the fault of the Court, or of the individual who applies for the taxation of the bills, that the difficulties do exist. And if the case turns out to be fairly represented, it is not easy to believe that a professional gentleman, with all these matters going on, and regard being had to what has passed since the payment was made, should not have been anxious to preserve all the means of doing justice to himself, if the bills were to be finally taxed, or that he should not have preserved all the evidence of which he was originally in possession. It is impossible for the Court to say, if matters have been left open for three or four years, that, because a solicitor has lost the benefit of the attendance of his clerk, a client is not to succeed in his application to have his bills of costs taxed; if the means of doing justice have not been lost through the fault of the other party, and if the right to have that taxation has not been destroyed by what has passed.

The Court, in many instances where difficulties exist, goes to work in a different way from ordering the general taxation of a bill; for, if difficulties exist, which have been produced by the fault of the parties applying, the
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Court furnishes the Master with the means of trying particular items by a species of evidence, which under other circumstances it would not admit. So again there are cases, in which the Court does not direct a general taxation, but confines itself to the objectionable items pointed out, giving the party an opportunity of meeting the objections to those items by a species of evidence, which, without the particular direction of the Court, the Master could not receive. But if this case is capable of being represented as one, in which, in consequence of the nature of the transactions in the interval between the first application to the Court of King's Bench and the present day, the right of having the bill taxed has been preserved entire, then the application ought to be disposed of exactly as it would have been, within six weeks after payment of the bills under the protest. The client had at first a clear right of taxation; and if that right remains, the application is the common one.

I shall again look at so much of the affidavits as apply to the general ground of taxation: for if the general ground can be made good, it is unnecessary to consider any of the items. If, upon the general ground, a general taxation cannot be ordered, then the nature of the case is such, as to require a very minute attention to each item which has been made the subject of argument at the bar.

I am of opinion that the last bill must be taxed generally: and with respect to the antecedent bills, Mr. *Stead* must point out the items which are complained of. Though the bills may be considered, and though, in one sense, I consider them as bills claimed against the

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person who applies for this taxation, yet, in a strict sense, much of them would be taxable only on the application of another person, namely, the trustee of the sequestrated estate in *Scotland*: and they run through such a series of years, that there would be injustice in having them all taxed generally. With regard, therefore, to the first five bills of costs, the only order which I ought to make is this: Let the person applying for the taxation, point out the items which are the subject of his complaint; let the Master take these items into consideration, and let him be at liberty to exercise as large a discretion as he pleases, with respect to the evidence on which he is to proceed in forming his judgment as to those items; and let him report his opinion to the Court.

“ His Lordship doth order that it be referred to the Master to tax the bill of costs for the year 1817, delivered by Messrs. *Kaye, Freshfield, and Kaye*, to the Plaintiff *D. Stead*; and, in order thereto, and for the purpose of the reference of the other bills of costs hereby referred, it is ordered that the Plaintiff and Messrs. *Kaye and Co.*, are severally to produce before the Master upon oath all books, papers, writings, and vouchers, in their custody or power, relating thereto, or any of the items or charges therein, and are to be examined upon interrogatories as the Master shall direct, who is to make all just allowances: and as to the five additional bills of costs, it is ordered that the same be referred to the said Master; and it is ordered that the said Plaintiff, *D. Stead*, do point out and deliver to *J. H. Freshfield* a schedule or list of the items which are the subject of his complaint; and it is ordered that the said Master do take the same into his consideration,
and,

and, under the circumstances, the Master is to exercise as large a discretion as he thinks fit, as to the evidence on which he is to proceed in forming his judgment on those items; and it is ordered that the Master do state his opinion to the Court upon all the matters referred to him: and in case it shall appear that *Kaye* and Co., &c., or any of them, have been overpaid in respect of such last-delivered bill, they are to deliver, upon oath, to *D. Stead*, all books, papers, vouchers, and writings, in their custody or power, belonging to the said Plaintiff respecting the last-delivered bill, and are respectively to repay and refund to the said Plaintiff such overplus."

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BETWEEN

TIMOTHY POWELL, JOSHUA POWELL, and
THOMAS HUNGERFORD POWELL,

Plaintiffs;

AND

JOSEPH MARIA SONNET, ANTONIO BERNIS,
JOSEPH MARIA BERNIS, JUAN GONZALEZ REY, and PEDRO MARIA ADRIA-
ENSEN, - - - Defendants.

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June 16.

Aug. 7, 8. 22.

In an interpleading suit, the Court will order the money, which has been brought in by the Plaintiff, to be paid to a person having authority from all the Defendants to receive it, though some of the Defendants have not appeared: and for that purpose a reference will be directed to the Master to inquire, whether a sufficient authority to receive the money has been given.

IN *Michaelmas* term 1824, *Joseph Maria Sonnet, Antonio Bernis, and Joseph Maria Bernis*, who were the surviving partners of the firm of *Sonnet, Bernis, and Co.*, brought an action in the Court of King's Bench against the three *Powells*, now Plaintiffs in equity, to recover damages for the loss which *Sonnet, Bernis, and Co.* had sustained by the improper sale of certain wools which they had consigned to the *Powells*. At the trial of the action, on the 4th of *March* 1825, one of the objections taken by the Defendants was, that *Sonnet, Bernis, and Co.* had long since become bankrupts or insolvent, and that the action ought to have been brought in the names of *Rey and Adriaensen*, who had been appointed, according to the laws of *Spain*, syndics or assignees of their estate and effects. The objection did not prevail, and the Plaintiffs at law recovered 24,000*l.* damages. The *Powells* brought a writ of error returnable in the Exchequer Chamber. On the 28th of *January* 1826, that court affirmed the judgment; in two days afterwards, a writ of error was brought returnable in parliament, and was still pending. The

errors

errors assigned did not involve the merits of the cause, but turned merely on technicalities in the record.

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In the mean time, the *Powells*, on the 11th of *May* 1825, filed a bill, which was in substance a bill of interpleader, against the Plaintiffs at law, and their alleged syndics or assignees, thereby stating, that, in *December* 1815, *Joseph Maria Sonnet*, *Antonio Bernis*, and *Joseph Maria Bernis*, became bankrupts or insolvent according to the laws of *Spain*; that all their property, estate, and effects, including any demand which they might have upon the Plaintiffs in respect of the subject-matter of the action at law, were assigned to and vested in *Juan Gonzalez Rey*, and *Pedro Maria Adriaensen*, who were duly chosen assignees and syndics of their estate and effects; and that the Plaintiffs, if they were to pay the amount of the damages to the partners of the firm, would be liable to pay it over again to the assignees. The prayer was, that *Rey* and *Adriaensen* might be decreed to accept the 24,000*l.* in satisfaction of all demands in respect of wools consigned by *Sonnet*, *Bernis*, and Co. to the Plaintiffs, and that *Sonnet* and the two *Bernis*'s might be restrained from taking any proceedings to compel the payment to them of the 24,000*l.*

On the 4th of *November*, the Plaintiffs obtained an order, that, on payment of the 24,000*l.* into court, service of the subpoena on the attorney in the action should be good service on *Sonnet*, *Antonio Bernis*, and *Joseph Maria Bernis*; but neither this order nor the subpoena was served, till the 20th of *January* 1826. Appearances were immediately entered for those three Defendants, and, a commission to take their answer having been craved, the common injunction issued against them.

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they cannot safely pay it to those who have obtained the judgment, because the true title is in *Rey* and *Adriaensen*. We deny that the title is in *Rey* and *Adriaensen*; but we say, that it is unnecessary to enter into any investigation or discussion of the point, because *Rey* and *Adriaensen* concur in authorising the payment to be made to the person named by the other Defendants to receive the money. The suit is in substance a suit of interpleader. If the Court sees reason to believe that there is no dispute between the parties, whose alleged adverse rights are the only ground for the application to an equitable jurisdiction, it will take proper means to ascertain that fact; and, when the fact is ascertained, will put a stop to a litigation which is disclaimed by the only parties between whom any question could be supposed to exist. They, who file such a bill, ought to pay the costs of it; but, in order to lessen any difficulties which may be thought to attend the case, we are willing that they should have their costs as interpleading Plaintiffs.

Mr. *Horne* and Mr. *Koe*, *contra*.

Let the Defendants who have appeared put in their answer; and they may then call upon the Court to listen to any application which they may have to make with respect either to the injunction or to the money which has been paid in. But, before answer, such applications as have been made in this cause are altogether irregular.

It is impossible to protect the Plaintiffs by any order, which can be made in the cause, in its present state. *Rey* and *Adriaensen* have not appeared; no order, therefore, can be made so as bind them; and, consequently, the Plaintiffs will still be exposed to their claim.

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Mr. *Hart*, in reply.

It is enough if the Court ascertains to its satisfaction, that the Plaintiffs run no possible danger from any claim which can be made by *Rey* and *Adriaensen*. The object of requiring answers is merely to add to the delay. Much time must be lost, before answers can be obtained from Defendants residing in *Spain*; when they are obtained, they will probably be found not quite sufficient in every point for Plaintiffs like these: the Plaintiffs will say, that they have a right to a sufficient answer; and exceptions and further answers and amendments will follow, till the hopes and the patience of these foreign merchants be exhausted.

On the 16th of *June*, the Lord Chancellor made the following order: — “ That it be referred to the Master of this Court in rotation to inquire, whether the Defendants have given a sufficient authority to any and what person to receive the sums mentioned in the Plaintiffs’ bill, and to give an acquittance to the Plaintiffs against all demands upon the subject of this suit. And the Master is to state to the Court not only his opinion, but also the facts on which that opinion is founded, and to proceed *de die in diem*; and after the Master shall have made his report, any of the parties are to be at liberty to make such application to this Court as they may be advised.”

A state of facts was carried in before the Master on behalf of *Sonnet*, *Antonio Bernis*, and *Joseph Maria Bernis*; and, on the 25th of *July*, the Master made his report. It set forth a power of attorney, by which *Rey* and *Adriaensen* authorized, in the most ample terms, a
Mr.

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Mr. *Renell* to claim and receive from the *Powells* the sums in question; a similar power of attorney to *Renell* from *Sonnet*, *Antonio Bernis*, and *Joseph Maria Bernis*; and an instrument, by which, after reciting the verdict and the two powers of attorney, *Rey* and *Adriaensen* released the *Powells* from all claims, upon their paying to *Renell* the amount of the verdict and the costs. The Master concluded by certifying, that he was of opinion, that the Defendants had given a sufficient authority to *Renell* to receive the money, and to give the Plaintiffs an acquittance against all demands in respect of the subject of the suit.

The Plaintiffs in equity took exceptions to the report.

The exceptions being set down, the Lord Chancellor said, that they should be heard on the 7th of *August*; and, in the event of their being overruled, the Defendants were to be at liberty to pray, as consequential upon the confirmation of the report, directions touching the payment of the money out of Court.

Mr. *Horne* and Mr. *Koe*, in support of the exceptions, contended, first, that, upon the construction of the instruments set forth in the report, the Plaintiffs would not be safe in paying the money to *Renell*;

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And, secondly, that no effectual step could be taken, and least of all, could any order for the payment of the money be made, until *Rey* and *Adriaensen* had appeared.

Mr. *Hart* and Mr. *Tinney*, *contra*.

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The Master is of opinion, that *Renell* has a sufficient authority from all the Defendants to receive the money. The exceptions insist, that the authority is not sufficient. My opinion is, that the authority is sufficient. I shall therefore direct the money to be paid to *Renell*, as the attorney of all the Defendants; and I see no objection to annexing to the order an injunction, restraining all the Defendants from making any further demand in respect to this matter. If in a common interpleading bill, counsel were to come to the bar, and before any of the Defendants had appeared were to ask that the money might be paid to a person duly authorized by all to receive it, the Court, if satisfied of the sufficiency of the authority, would order the payment to be made to that person on behalf of all.

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The order made was, "That the 29,368*l.* 10*s.* 7*d.* Bank 3 per cent. Annuities, standing in the name of the Accountant General in trust in this cause should be transferred to *Robert Prudem Renell*, on behalf of all the Defendants; that the exceptions should be overruled, and the Master's report confirmed; that it should be referred back to the Master to tax the Plaintiffs their costs of this suit, except the costs of the exceptions; that the sum of 5*l.*, deposited with the registrar on setting down such exceptions, should be paid back to the Plaintiffs; that the Master should deduct the same out of the Plaintiffs' costs as taxed; that such costs, when taxed, should be paid out of the sum of 440*l.* 10*s.* 7*d.* cash in the bank, placed to the credit of this cause; and that the residue of the said sum of 440*l.* 10*s.* 7*d.* cash should be paid to *Robert Prudem Renell*: and it was ordered that all the Defendants should be perpetually enjoined from all proceedings at law or otherwise against the Plaintiffs to recover the sum of 24,000*l.* in the bill mentioned,

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mentioned; and from all other proceedings or otherwise touching the claim, demand, damages, and other matters in the bill mentioned, or any matters respecting which the action at law hereinafter mentioned was brought, excepting so far as regards the costs awarded and to be awarded in the action at law in the bill mentioned; as to which costs, his Lordship reserved the consideration, until after the decision on the writ of error in the House of Lords; and after the writ of error should have been heard and decided, any of the parties were to be at liberty to apply to this Court as they should be advised."

July 25.

In the proceedings on the writ of error, the judgment of the King's Bench was affirmed in the House of Lords; and on the application of the Defendants in equity, who were Plaintiffs at law, it was ordered, that they should be at liberty to sue out execution against the *Powells* for the costs awarded to them in the action at law, and on the writs of error in the Exchequer Chamber and the House of Lords.

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SIR HENRY ENGLEFIELD, by his will dated in November 1778, devised a mansion-house and estate called *White Knights*, with various other lands and hereditaments, to Lord *Cadogan* and Sir *Charles Bucke*, and their heirs, to the use of his, the testator's son, *Henry Charles Englefield* for life, without impeachment of waste except in the house and offices; remainder to the first and other sons of *Henry Charles* successively in tail male; remainder to the use of the testator's second son *Francis Michael Englefield* for life, without impeachment of waste; remainder to the first and other sons of *Francis Michael* successively in tail male; remainder to the testator's daughter *Teresa Anne* for life, without impeachment of waste; remainder to her first and other sons successively in tail male; with divers remainders over. A power of sale was given to the trustees by the following clause:—"Provided also, and my will further is, that, notwithstanding any of the
Lands were devised to a trustee and his heirs, to the use of *A.* for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and, in the meantime, to invest it in the public funds, and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2448*l.*, conveyed the timber to the purchaser, and the trustee, in consideration of 13,400*l.*, conveyed the land exclusive of the timber. Many years afterwards, the tenant for life, being advised, that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 5 per cent. stock as 2448*l.* would have produced at the time of the sale. After the death of *A.*, the next remainder-man, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment, on the ground that the power of sale was not well executed: Held, that a court of equity ought not to interfere by injunction to deprive him of the benefit of that judgment.

Semble. A plaintiff ought never to come into a court of equity to have an alleged defect in the execution of a power supplied, without admitting on the record, that, at law, the power has not been well executed.

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by the same or any other deed or deeds, writing or writings to be sealed, delivered, and attested as aforesaid, to limit and appoint the same manors, messuages, lands, tenements, wood-grounds, rents, tithes, hereditaments, and premises, whereof the uses shall be so revoked, either unto such purchaser or purchasers, or the person or persons making such exchange or exchanges, and his, her, or their heirs, or otherwise to limit, declare, or direct or appoint such new or other use or uses, trust or trusts of or concerning the same manors, messuages, lands, tenements, wood-grounds, rents, tithes, hereditaments, and premises, as shall be requisite and necessary for the executing and effecting such sales, dispositions, and exchanges; and, upon payment and receipt of the money arising on the sale of the said premises, or any part or parts thereof, which shall be absolutely sold as aforesaid, to give and sign proper receipts for the money for which the same shall be so sold, which receipts shall be sufficient discharges to any purchaser or purchasers for the purchase-money for which the same shall be sold, or for so much thereof as in such receipts shall be acknowledged or expressed to be received; and such purchaser or purchasers shall not be answerable or accountable for any loss, misapplication, or non-application of such purchase-money, or any part thereof." 'The monies, arising from any sale, were to be laid out in the purchase of other lands to be conveyed to the same uses, and, until proper purchases were found, were to be invested in government or real securities.

The testator died in 1780; and in the following year Sir *Charles Bucke* died.

In 1783, *White Knights* was sold to Mr. *Martin*, and the purchase was completed by an indenture, to which
Lord

included; and the furniture of the mansion-house was also assigned to Mr. *Martin*, without the payment of any additional consideration. The indenture further witnessed, that, in consideration of 2448*l.* paid to Sir *Henry Charles Englefield* by *William Byam Martin*, he, Sir *Henry Charles Englefield*, granted, bargained, and sold unto *Martin* and his heirs, all the timber, and the fruit and other trees of what nature or kind soever, and all woods and underwoods then standing, growing, or being on the said lands and grounds thereby granted, bargained, and sold; and all the right, interest, and demand of him, Sir *Henry Charles Englefield*, of, in, and to the same.

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The 13,400*l.* was paid to Lord *Cadogan* and invested upon the trusts of the will: the 2448*l.* was received by Sir *Henry Charles Englefield*; and the timber was left standing.

In 1806, doubts having been suggested, whether, inasmuch as the timber had not been severed at the date of the execution of the indenture of the 12th of *May* 1783, Sir *Henry Charles Englefield* was entitled to retain the sum at which it had been valued, he, on the 29th of *July* 1806, purchased and transferred into the name of Lord *Cadogan* 3681*l.* 4*s.* three per cent. consolidated bank annuities, being the amount of stock which the 2448*l.* would have produced at the time of the completion of the sale.

Mr. *Martin* afterwards sold the property to the Duke of *Marlborough*: and large sums were expended in adorning and improving the estate.

In *March* 1822, Sir *Henry Charles Englefield* died without issue. *Francis Michael Englefield* was previously

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1783; that large sums of money had, with his knowledge, been expended by the purchasers in the improvement of the property; and that he, by his ~~agents~~, had attended the progress, through parliament, of the bill for appointing new trustees of the devised estates, and had received his costs out of the trust funds produced by the sale. The prayer was, that it might be declared that the Defendants were entitled to have any defect in the manner, in which the sale had been carried into execution, made good, and that the Defendant might be decreed to confirm the title of the Plaintiffs, and restrained from proceeding at law for the recovery of the premises.

The Defendant, by his answer, stated, that, though he was aware of the fact that *White Knights* had been sold to Mr. *Martin*, it was not till 1823 that he had any knowledge of the tenor of the deed of *May* 1783, or of the contracts of sale, or of the manner in which they had been carried into execution.

An injunction had been obtained for want of answer; and, on shewing cause why the injunction should not be dissolved, the question in the suit was raised.

Mr. *Hart*, Mr. *Pepys*, and Mr. *Cockerell*, in support of the injunction.

The question is, ought *Cholmeley* to be allowed in equity to avail himself of his judgment at law, to the prejudice of the Plaintiffs, who are purchasers for valuable consideration. The intention of the parties to the deed of *May* 1783 was, that the power should be executed; the contract was, that the estate should be sold to Mr. *Martin* in execution of the power; and he paid the consideration which gave him a right to have the contract executed. If it has not been executed in such

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in form, a court of equity has interfered to supply the defect. But here there was no intention to execute the only power which the trustee had; the intention was to execute a power which did not exist. A court of law has determined, that the trustee had no power to sell the land apart from the timber growing upon it; yet that is the power which he has attempted to execute, and which, in fact, he has completely executed, if the power be supposed to exist. The Plaintiffs, therefore, call upon the Court to give the trustee a power which the testator did not give him, and to hold that the attempt to execute a power, which he did not possess, is a good execution of a different power which he has not attempted to execute. *Reid v. Shergold.* (a)

This Court, if applied to in 1783, would not have assisted in carrying into execution the contracts stated in the deed of *May* of that year; and, if the contracts were not in substance a valid execution of the power then, they cannot have acquired a new character by the lapse of years. The transaction of 1783 was contrary to the intention of the donor of the power: such an act is never upheld in any court of justice; if it is bad at law, it is still worse in equity.

The arrangement, which took place in 1806, could not remedy the substantial vice in the proceedings of 1783. That, which is, at the time, an invalid execution of a power, cannot be made good by subsequent acts. *Hawkins v. Kemp* (b), *Burges v. Lamb.* (c)


There is no ground for alleging, that the Defendant has done any thing to preclude him from enforcing his legal title. His title did not accrue till 1822; and the
acts,

(a) 10 *Ves.* 370.

(b) 3 *East*, 410.

(c) 46 *Ves.* 174.

that purpose there was submitted to him, along with the record as it then stood, a correspondence between Sir *Henry Charles Englefield* and the agent of Mr. *Martin* in 1782 and 1783, which contained, as the Plaintiffs alleged, the contract that was carried into effect by the deed of *May* 1783. This correspondence shewed, that the negotiation for the purchase was entirely with Sir *Henry Charles Englefield*; that the terms of the contract were, that 12,000 guineas should be paid for *White Knights*, exclusive of the timber, which was to be taken at a value estimated according to the custom of the country; and that afterwards an adjoining parcel of land was included in the purchase, which added 800*l.* to the purchase-money.

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 v.
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The following observations were subsequently transmitted to the parties, as containing Lord *Eldon's* judgment on the motion:—

“ This bill is brought by Sir *Charles Cockerell*, *Henry Trail*, Sir *Richard Blount*, the Duke of *Marlborough*, and Dr. *Blackstone*: and, after stating, as it originally stated, the case, has, as I understand the matter, now introduced into it by amendments, the correspondence which took place previous to the execution of the conveyance of *May* 1783;— a correspondence, which seems not to state, as the conveyance itself does, two distinct contracts, one for the sale of the lands, including the ground and soil of trees (subject to what is stated about commons), and another contract with another vendor for the timber, fruit trees, &c. (and *Nowell's* affidavit shews what trees and of what value, as to some of them, a tenant for life in this case was supposed to have a right to cut as unimpeachable of waste), saplings, and, as the Defendant's answer suggests, or was meant to suggest,

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Master's report in *August* 1822; the confirmation of it in *November* 1822; and the order for transfer to the Defendant of the monies, including the timber money. I understand that transfer not to have been called for or made. The bill then states the *formedon* brought by the Defendant in *Michaelmas* term 1823 — that the question whether the deed of the 12th of *May* 1783 was a good execution of the power, was raised in the pleadings in the Common Pleas — that the Court determined it not to be a good execution of the power — and that judgment was thereupon given for the demandant upon that point.

“ If that judgment is right, there must be admitted to be a defect at law in the execution of the power, and that at law the power is not well executed. The question whether the power is well executed at law, is a pure legal question. But this bill, in the frame of it, without admitting that there is a defective invalid execution at law, — stating that the Plaintiffs are advised that, if there be any defect at law in the execution of the power, yet, under the circumstances such defect will be supplied in a court of equity,—states applications for doing all necessary acts for confirming the title, not admitting any to be necessary. And the prayer is, upon a bill not admitting any acts to be necessary, that all necessary acts may be done for confirming the title, and that the Plaintiffs may be declared entitled to have any defect, if there be any, made good. And then the bill prays an injunction to restrain further proceedings in the action in which the Court of Common Pleas has given judgment upon that point, and from instituting any other proceedings for recovery of the premises.

“ I see no ground for preventing the Defendant from proceeding to try his title at law, if the Plaintiffs in this cause do not think it proper to admit that he has a right
to

of equity dealing with the question of his taking possession by virtue of his legal right, as the case, considered, if it can be so considered, as an equitable though a bad legal execution of the power, may require. For, suppose the Court should be of opinion that there was a good equitable though a bad legal execution of the power, and that judgment in equity should be reversed, the party claiming in the *formedon* should not, after all has been gone through in equity, be sent to trial at law.

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“ If it is admitted that the court of equity is to take it for granted that the power has been ill executed at law (which the bill does not admit), and the question shall, on all sides, be admitted to be merely, whether the admitted void execution at law shall be made good in equity, a question much embarrassed by the frame of the record, then the following circumstances will be to be considered, and their effect in equity determined : —

“ First. The correspondence previous to the contracts, not dividing, as to the persons to whom it was to be paid, the purchase-money, but stating, as it were, one contract : the conveyance stating two distinct contracts for distinct subjects, and the conveyance having distinct receipts indorsed.

“ Secondly. Whether it is possible to consider the equitable effect of two such contracts the same as if there had been but one contract, regard being had to the subject-matter of the two contracts.

“ Thirdly. What is the effect of selling in 1783, when no other purchase was in view, and the money arising from the sale in 1783, remaining money, in 1822, and part of the purchase-money, as his own personal property,

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court of equity decide (as it were upon error) that it is a good execution at law? and if it is, what have the Plaintiffs to do here? If their ground of applying here is, that it is a good equitable execution, must they not either admit that it is a bad legal execution, and admit all that is necessary to prove the Defendant in this cause entitled at law, or allow him to prove by trial every thing that is necessary to establish that he is so entitled, whether it be pedigree or any other matter?"

The injunction was dissolved.

The bill was afterwards amended under an order dated the 21st of *June* 1828.

The amended bill, after setting forth the correspondence between Sir *Henry Charles Englefield* and Mr. *Martin's* agent, stated, that the agreement contained in the letters had been adopted by Lord *Cadogan*; and that, it being conceived at the time that Sir *Henry Charles Englefield* was entitled to the amount of the valuation of the timber, the recitals in the deed of *May* 1783 had been introduced by mistake, and did not set forth the agreement according to the true effect thereof. The expressions in the original record, which seemed to contest the legal invalidity of the execution of the power, were struck out; and, in addition to the relief before prayed, the amended bill sought to have the deed of *May* 1783 rectified, and made conformable to the contract contained in the correspondence.

The cause was brought to a hearing before Sir *John Leach*, Master of the Rolls, when the bill was dismissed. (a)

1830.
March.

(a) See *Russell & Mylne's Rep.*

Eldon, LORD CHANCELLOR, refused to make any order on the petition; stating that, even if the Master should report that it would be for the benefit of all parties interested that improvements should be made in the mansion-house, he would not confirm the report.

1827.

NAIRN
v.
MARJORI-
BANKS.

GOODSON v. ELLISSON.

THE case stated in the bill was, that, by an indenture bearing date the 1st of *June* 1767, *Robert Buck* and *Susannah* his wife covenanted to levy a fine unto *Richard Ellison*, and his heirs, of certain lands situate in *Kent*, which fine, as two equal undivided third parts of an undivided moiety of the premises, was to enure to the use of *Robert Buck* for his life; remainder to the use of *Richard Ellison* and his heirs, upon trust to convey the same as *Susannah*, the wife of *Robert Buck*, should by deed or will appoint, and in default of such appointment, to the use of *Robert Buck* in fee. The fine was levied; and, shortly afterwards, *Susannah Buck* died in the lifetime of her husband, without having made any appointment.

1824.

August.

1826.

March.

July.

December.

1827.

April 21.


Semble, A trustee under an old trust, creating successive limitations of equitable interests, some of which had failed, is entitled, before he can be required to convey, to have the equitable title of those who call for a conveyance ascertained by inquiry, and to have the deed of conveyance settled in the Master's office.

Semble, Where the *cestuis que trust* convey their

attain

beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the *cestuis que trust*, who sold to him, parties to the suit.

legal estate of inheritance, in two equal third parts of a moiety of the lands comprised in the deed of *June* 1767. Repeated applications had been made to the Misses *Ellisson* to convey to *Goodson* the legal estate of the lot purchased by him. The vendors had offered to give any evidence or explanation that might be required with respect to their title, and to defray the expense of any investigation and of any professional assistance, which the Misses *Ellisson* might require; but these ladies persisted in refusing to convey. The bill, therefore, was filed by *Goodson* against them as Defendants, praying that they might be decreed to convey to him the legal estate of the two equal third parts of the moiety of those parcels of land which he had purchased.

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 GOODSON
 v.
 ELLISSON.

The Defendants, by their answer, declared their belief, that *Richard Ellisson* did not execute the indenture of the 1st of *June* 1767, or accept the trusts of it, or become a party to the fine alleged to have been levied in pursuance of it; stating, that, although divers acts had been from time to time done by those claiming title to the premises in question, to which *R. Ellisson* and his heirs, if he had accepted the trusts, must have been parties, and although, in the year 1796, a suit was instituted for a partition of this estate, or of a part of it, in which a decree for a partition was pronounced, and a partition actually took place, yet *R. Ellisson* and his heirs did not, nor did any of them ever become, nor was he or any of them ever required to be, a party or parties to such act or deeds or suit; that if the trusts of the indenture were ever in any way accepted by *R. Ellisson*, they must have been put an end to in his lifetime by surrender, release, or otherwise; and that no applications had been made to them to execute any conveyance, till the 11th of *November* 1822. They admitted that they had refused to execute a conveyance to the Plaintiff; threw

estate without his or their concurrence. *Emery v. Grocock* (a), *Cooke v. Soltau*. (b) If a reconveyance was to be presumed, then the Plaintiffs had no right to come into a court of equity. If the legal estate was in the Defendants, still it was incumbent on the Plaintiff to shew that the whole of the equitable interest was in those from whom he had purchased: and, upon so intricate a devolution of title as was stated in the bill, it was not reasonable to expect that the Defendants were to take upon themselves the risk of coming to a conclusion, or were to be satisfied with any opinion not judicial.

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GOODSON
v.
ELLISSON.

Mr. *Horne*, for the Plaintiff, proposed, that the deeds should be examined by the solicitor and counsel of the Defendants, in order to satisfy themselves as to the title of the Plaintiff; and he offered to pay the costs of the Defendants as between solicitor and client, if they would, even at this period, execute the conveyance.

On the recommendation of the Master of the Rolls the cause stood over, in order that the deeds might be inspected on behalf of the Defendants.

The inspection took place.

The Defendants persisted in refusing to convey: and the cause was again spoken to.

Lord *Gifford*, MASTER of the ROLLS.

1824.
Aug. 18.

The first defence to this bill is, that, under the circumstances of the case, and after the lapse of so long a period,


(a) 6 *Mad.* 54.

1823, and not in *December* 1824,

(b) 2 *Sim. & Stu.* 154. (This as stated in the report.)

case was decided in *December*

fessional man the trustee may choose, the trustee may still with impunity refuse to convey; and that every *cestui que trust* must come into this Court, in order to obtain a conveyance of the legal estate?

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 GOODSON
 v.
 ELLISSON:

I admit, that it is only in a strong case that costs will be given against trustees; yet, where they refuse, without a reasonable motive for their refusal, to act without suit, they will be visited with costs. “Trustees,” says Sir J. Leach in *Taylor v. Glanville* (a), “are entitled to the protection and direction of the Court in the exercise of their trusts, and can never be called upon to pay costs, unless they refuse to act without suit merely from obstinacy and caprice.” In *Jones v. Lewis* (b), a suit for specific performance was rendered necessary, in consequence of a trustee refusing to join the vendor in the conveyance; and the Court ordered the trustees to pay all the costs of the suit, as well those of the vendor as of the purchaser.


In the present case, I am of opinion that the suit has been rendered necessary by the caprice and pertinacity of the Misses *Ellisson*; and, considering the immense expense to which *cestuis que trust* may be exposed, where a trustee, who might have satisfied himself out of Court concerning the propriety of what he was called upon to do, as well as by coming into Court, refuses to act unless he is compelled by a decree, the Defendants must pay the costs of the suit.

The decree was, “that the Defendants should execute the conveyance of the 24th and 25th days of *February* 1822, in the pleadings mentioned, of the legal estate and inheritance thereby stated to be then vested in them, of
 and

(a) 3 *Mad.* 178.

(b) 1 *Cor.* 199.

of the Court? According to the case stated by the bill, the Defendants were trustees for eight individuals, under whom the present Plaintiff claimed by a recent conveyance; was the Court, in his favour, to execute the trust as to a portion of the property, when not one of those eight persons was a party to the suit?

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 v.
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Even if it were clear that the Plaintiff had made out a complete title, it would be extravagant to throw the costs of the suit on the Defendants. Here was a long deduction of title through a period of between fifty and sixty years, in which there had been a frequent transmission of right from one person to another, and, the whole interest, after the failure of many previous limitations, was represented as having become vested in a considerable number of persons. A trustee was not bound to satisfy himself by any private opinion, as to the results of law and of fact, on which such a title depended; he had a right to have the direction and indemnity of the Court; and in declining to act without that direction and without that indemnity, there was neither pertinacity nor caprice.

Mr. *Horne* and Mr. *Tinney*, *contra*, insisted, that to have entered into formal proof of the levying of the fine, or of the death of *Susannah Buck* without having exercised her power, would have been an useless addition to the expense to which the Plaintiff had been already exposed; since the Defendants admitted by their answer that they had been informed that the fine was levied, and that *Susannah Buck* died without having exercised the power: and they did not make any suggestion putting either of those facts in issue. In like manner, with respect to the other points on which the title of the Plaintiff depended, further inquiry might have been proper, if there were the slightest evidence before the

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ELLISSON.

Court in opposition to that of the Plaintiff, or if any doubt could be entertained as to the propositions of fact on which his case rested. Here there was no allegation, on the part of the Defendants, of any specific fact which would affect the title of the Plaintiff; and the possession had corresponded with the case stated by the bill. Further investigation was asked, not in order to satisfy their own minds, or to remove any scruples, but for the sake of overwhelming their *cestuis que trust* with costs. If there was any proposition of law or of fact, about which a shadow of doubt could reasonably be entertained, a trustee would be justified in declining to convey without the sanction of the Court: but in the present case, no scruple existed, no doubt was suggested, no objection was stated; and the interference of the Court was required, not to aid the understanding of the trustees, or to protect them from apprehended dangers, but to overcome an unreasonable resistance, which proceeded either from a desire to set up an unfounded claim of beneficial interest in themselves, or from the hope of compelling the *cestuis que trust* to purchase their acquiescence.

1826.
July 4.

Eldon LORD CHANCELLOR.

In 1767 a deed was executed, and I will assume that a fine was properly levied in pursuance of it, by which an estate was granted and conveyed to *Richard Ellison* and his heirs on certain trusts. The bill deduces the various changes of the title to the equitable interest, which occurred between 1767 and *November 1822*, bringing it, in 1819, into eight different persons, each of whom is represented as the owner of an undivided eighth part of the property. These eight persons sell the property in different lots to different persons; and, the present Plaintiff having bought one of the lots, a deed is prepared, conveying certain parcels of land to him; that deed

the

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ELLISSON.

the eight persons, who are represented as the owners of the beneficial interest, have executed; and the co-heiresses of *Richard Ellison* are also required to execute it. They refuse, and the bill is filed.

By the answer, they first state that *Richard Ellison* never accepted the trust, and they refer to transactions of some importance with respect to the property, in the interval between 1767 and the filing of the bill, to which neither they, nor any of the persons, whom they represent, were called upon to be parties, though some of the persons interested in the property at those times were conversant with the law. From these circumstances, they come to the conclusion that the trust was never accepted; and towards the close of the answer, they intimate that they themselves have a beneficial interest in the estate. How they make out that such an interest is in them, they do not explain; and there is not the slightest colour of pretext for supposing that they have a single particle of beneficial interest.

The Master of the Rolls has ordered the Defendants to execute the conveyance, and to pay the costs of the suit.

Now, even if the Plaintiff had been the purchaser of the whole estate, and the conveyance had related to the whole, it would have been a matter for consideration, whether the trustees would not have a right, where there has been so much devolution of title, to have the title examined in this Court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. But this Plaintiff is the purchaser of only sixteen acres of the property, and the rest of the estate has been sold to other persons in different lots! Now, I confess it is quite new to me, to be

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ELLISON.

the land from some statute, or bond, which I am to enter into; or upon intent to be re-enfeoffed, or intent to be vouched, and so to suffer a common recovery, or upon intent that the feoffees shall enfeoff over a stranger: but where the trust is not special nor transitory, but general and permanent, there it is an use." "An use," he afterwards says, "is a trust reposed by any persons in the terre-tenant that he may suffer him to take the profits, and that he will perform his intent." (a) In *Chudleigh's* case (b), one of the characteristics of an use is stated to be, "that the terre-tenant shall make estates according to the direction of the *cestui que use*." The special trust is directed towards the accomplishment of a particular purpose, and is limited in its duration. The general trust may continue for an indefinite period, in the course of which the beneficial interest may undergo many changes, and is liable to be divided into a succession of fragments: and the duty of the trustee is, upon being saved harmless in point of expense, to execute from time to time such conveyances as the interests of his different *cestuis que trust* may require. It is a matter of daily experience, where property is holden in trust for a number of persons, that their several portions of the trust property are conveyed or assigned to them as they successively become entitled to the absolute ownership in possession: and no doctrine would be productive of greater practical inconvenience, than the position, that a trustee is not to part with any portion of his legal interest in the subject of a trust, unless he at the same time divests himself altogether of the character of trustee. The present Plaintiff, so far as regards the sixteen acres which he has purchased, is the *cestui que trust* of the Defendants; and he has

(a) *Bacon's* reading on the statute of uses.

(b) 1 *Rep.* 121 b.

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has a right to call upon them to execute for his benefit the trust with which they are clothed.

Mr. *Agar* and Mr. *Knight* insisted on the same topics of defence which they had before urged; particularly, that the suit was not so constituted with respect to parties, as to enable the Court to call upon the alleged trustees to convey a part of the trust estate.

Dec. 11.

The LORD CHANCELLOR expressed a doubt, whether, on the construction of the instrument of the 1st of *June* 1767, the legal fee, upon the death of *Susannah* without executing her power, did not vest in *Robert Buck*.

Dec. 12.

The LORD CHANCELLOR stated, that he thought there were parties enough before the Court to enable him to make a decree; that, in the case of an old trust, the Court was bound to inquire into the facts, if the inquiry could be at all useful; and that, in a case like the present, the trustees had a right to have the conveyance settled in the Master's office.

1827.
April 21.

The following decree was made: — “ His Lordship doth order, that the decree made in this cause, the 18th of *August* 1824, be reversed; and it is ordered, that it be referred to the Master to inquire and state to the Court, whether the Plaintiff is entitled to that beneficial equitable estate which he seeks to have clothed with a legal estate by conveyance: and in making the said inquiry, it is ordered, that the Master do ascertain and state to the Court whether all prior vested and contingent equitable titles have failed by deaths or non-existence of persons

persons who would have taken before the Plaintiff, &c. And it is ordered, that the said Master do tax the costs of the Defendants of this suit to this time, including their costs of the appeal, as between party and party, that the same, when taxed, be paid by the Plaintiff to the Defendants; but this taxation is to be without prejudice as to whether the Defendants shall not be finally entitled to any further costs, charges, and expenses: and His Lordship doth reserve the consideration of all further directions, and whether the Defendants shall be allowed any further costs, charges, and expenses up to this time, and also the consideration of all subsequent costs, charges, and expenses, until after the Master shall have made his report."

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paid at the end of seven years from the testator's death, with interest at 5*l.* per cent. from the end of one year after his death; and were charged on all the real and personal estate of the testator, except his lands in *Scotland*. The residue of that real and personal estate, subject to the payment of his debts and legacies, he gave to his brother *Ludovic Grant*. On the 2d of *August* 1772, the testator died, so that the legacies became payable on the 2d of *August* 1779. Sir *Ludovic Grant* died in 1790; and his son and heir at law, the late Sir *Alexander Grant*, became entitled to the residue of the real and personal estate of the testator, Sir *Alexander Grant*.

In 1782, the Defendant, *Charles Grant*, contracted with *J. C. Sholto Douglas*, for the purchase of an estate in *Jamaica*, at the price of 50,000*l.* To secure 10,000*l.*, part of the purchase-money, with interest at 6*l.* per cent., he and *Peter Grant* executed five bonds, dated the 2d of *December* 1782, in penal sums amounting to 22,330*l.* 6*s.* 2*d.*; and, on the same day, *Charles Grant's* legacy of 2000*l.*, and *Peter Grant's* and *James Grant's* legacies of 3000*l.* each, were assigned as a collateral security for the payment of the same sum.

In *July* 1783, *Douglas* filed a bill in the Court of Chancery of *Jamaica*, against the executors and trustees of Sir *Alexander Grant*, and against *Charles Grant*, *James Grant*, and *Peter Grant*, for the purpose of enforcing payment of the legacies in part satisfaction of the 10,000*l.* In 1788, a decree was made in this suit, which directed the Master to take an account of what was due in respect of the three legacies, and also an account of the real and personal estate of the testator, Sir *Alexander Grant*. In the proceedings under this decree, it appeared, that, on the 1st of *April* 1789, there was due in respect of the legacy to *James Grant*,

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Grant, 3898*l.* 1*s.* 6*d.*; in respect of the legacy to *Peter Grant*, 5050*l.*; and in respect of the legacy to *Charles Grant*, 2966*l.* 13*s.* 4*d.*: and it further appeared, that the late Sir *Alexander Grant*, as agent to the trustees and executors, had received assets to the amount of between 200,000*l.* and 300,000*l.* In 1792, Sir *Alexander Grant*, purchased the debt of 10,000*l.*, and the securities for it, from *Ross*, the surviving executor of *Douglass*; and, by indenture dated the 17th of December 1792, reciting that 22,435*l.* 1*s.* 7½*d.* was due upon the bonds, *Ross* assigned the bonds and legacies to *Alexander Lindo*, as a trustee for Sir *Alexander Grant*.

In March 1793, *Charles Grant* filed a bill in the Court of Chancery in *Jamaica* against *Ross*, *Lindo*, and Sir *Alexander Grant*, praying that, as against him, the assignment of the legacies might be declared fraudulent; that the three legacies might be deemed *pro tanto* a satisfaction of the bonds; that the bonds might be delivered up, the Plaintiff being willing to pay any balance which might remain, after the sum due for the legacies had been deducted; and that an injunction might issue, to restrain the Defendants from disposing of the bonds, or from proceeding at law against him, *Charles Grant*. In January 1794, *Charles Grant* obtained the injunction which he prayed; and, on appeal, the order granting it was, in 1799, confirmed by the Privy Council.

Long previous to this time, commissions of bankrupt had issued against both *Peter Grant* and *James Grant*; and, in April 1800, the assignees of these two gentlemen, together with *James Grant*, filed a bill in *Jamaica* against *Charles Grant*, *Lindo*, Sir *Alexander Grant*, and the representatives of the original testator, praying that *Charles Grant* might be decreed to pay what was due

due from him on the bonds, so that the two legacies of 3000*l.* might be exonerated, and that the amount due for principal and interest on those two legacies might be paid to the Plaintiffs.

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In *February* 1807, a decree was pronounced in this suit, which ordered that *Charles Grant* should pay to Sir *Alexander Grant*, in part satisfaction of the bonds, the amount of the two legacies, with interest; and that Sir *Alexander Grant* should, out of the assets of the testator, pay to the Plaintiffs the amount of the legacies, with interest. Appeals from this decree were presented both by *Charles Grant* and by Sir *Alexander Grant*: and, in 1809, the Privy Council reversed it, and ordered, among other things, that *Charles Grant* should pay to Sir *Alexander Grant*, in part discharge of the five bonds, what should appear to be due to *Peter Grant* and *James Grant* in respect of their legacies, and that Sir *Alexander Grant* should pay over the same to the Plaintiffs in the suit. The Master made his report, certifying the amount due for principal and interest on the two legacies: *Charles Grant* took exceptions, which were over-ruled by the Chancellor of *Jamaica*: an appeal was then presented; and, in *April* 1818, the order, over-ruling the exceptions, was confirmed by the Privy Council. The consequence was, that, in *February* 1819, *Charles Grant* paid 16,881*l.*, being the amount of the two legacies, with interest, to Sir *Alexander Grant*, in part discharge of the bonds; and the latter, in compliance with the decree of the Privy Council, handed the money over to the assignees of *James Grant* and *Peter Grant*.

No further payments had been made in respect of the bonds; and, on the other hand, the legacy to *Charles Grant* had not been satisfied.

have recovered by action in *Jamaica*. For by the laws of that island (a) an obligee may assign a bond by indorsement in a given form, and the first assignee may in like manner assign it to a second, and so on. By such assignments the assignee acquires all the rights of the obligee, and may put the bond in suit in his own name.

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v.
GRANT.

It was answered, that it did not appear that, in respect either of the parties to the assignment, or of the form of the assignment, the present case came within the rule of the law of *Jamaica*.

The LORD CHANCELLOR.

Suppose the bond has been so assigned as to enable the assignee to sue on it in *Jamaica* in his own name, it is not *Lindo* who is Plaintiff here, but the *cestui que trust* of *Lindo*; and the act which has been referred to, though it might give *Lindo* certain rights, would not extend those rights to *Lindo's cestui que trust*. In no view of the case could the present Plaintiff sue on the bond in his own name: in regard to him, the demand, which the bill seeks to enforce, is purely equitable.

Another objection made to the writ was, that, by the laws of *Jamaica*, a freeholder, who has five acres of planted ground, or a house of the yearly value of 10*l.*, is privileged from arrest; that the Defendant was a freeholder of this description; that the alleged debt was contracted when the Defendant and the Plaintiff's father were both resident in *Jamaica*; that the question, therefore, ought to be tried by the laws of that island; and that, as the Defendant could not have been arrested there

(a) *Statutes of Jamaica*, vol. ii. 141.

On the other hand, it was answered, that the injunction was gone in consequence of the death of Sir *Alexander Grant* and of the other Defendants to the suit of 1793; that, at all events, it was virtually superseded by the decree of the privy council in 1809, made in the suit of the assignees of *James Grant* and *Peter Grant*, which ordered *Charles Grant* to pay upwards of 16,000*l.* in part discharge of the bonds; that no suit was now pending in *Jamaica*, in which the Plaintiff could recover the balance due to him, for he could not prosecute the suit of *Charles Grant*, and the suit of the assignees of *James Grant* and *Peter Grant* related only to the two legacies of 3000*l.*; and that the pendency even of an effective suit in *Jamaica* would be no objection to the institution of a new suit here, when both parties were in *England*, and one of them was permanently resident here.

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In reply, it was urged, that the suit of *Charles Grant* must still be considered a subsisting and effective suit with respect to the adjustment of the balance as between his own legacy of 2000*l.* and the residue of the bond debt.

The LORD CHANCELLOR.

Feb. 10.

If the result of the whole proceeding up to the present time be, that nobody has any demand in respect of the matters of the different suits, except those who represent Sir *Alexander Grant*, the bill of 1793 may be considered as out of court. If the equities of that bill have been satisfied by subsequent proceedings, the injunction must be considered as gone. The questions, therefore, come to these two points — Is there any thing to be done in the suit in *Jamaica*? and what is the rule of this Court with respect to granting a writ of *ne exeat*

the assets of the original testator, and, in truth, they and he had all along in their own hands the principal and interest of the legacy: the bonds, therefore, were satisfied to the full amount of the penalties. *Clarke v. Seton.* (a)

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For the Plaintiff it was answered, that the debt due to him was the principal sum of 10,000*l.*, with forty-five years' interest at 6*l.* per cent., making a total of about 37,000*l.*, and leaving, after every allowance was made to the Defendant in respect of the legacy, a balance due of nearly 14,000*l.* The debt was not limited by the amount of the penalties; first, because *Charles Grant* had, by his injunction obtained in 1794, prevented the assignee of the bonds from obtaining payment of them, while the principal and interest were less than the penalty, *Pulteney v. Warren* (b); and, secondly, because the legacies were assigned as a collateral security, and the Plaintiff might apply them in satisfaction of the interest on the 10,000*l.* beyond the amount of the penalties of the bonds. *Clarke v. Lord Abingdon* (c), *Godfrey v. Watson.* (d)

The LORD CHANCELLOR stated that, in his opinion, the Plaintiff's demand was not to be limited by the amount of the penalties of the bond; for he had always considered, on the authority of *Duval v. Terry* (e), that a party, who had been restrained from proceeding at law, while the debt was under the penalty, had a right, in a court of equity, to principal and interest beyond the penalty of the bond.

Feb. 10.

The

(a) 6 *Ves.* 411.

(d) 3 *Atk.* 518.

(b) 6 *Ves.* 73.

(e) *Show. P. C.* 15.

(c) 17 *Ves.* 106.

Elliott v. Davis (a), *Pulteney v. Warren* (b), *Bond v. Hopkins* (c), *Atkinson v. Atkinson* (d), *O'Donel v. Browne*. (e) The bill of 1793 proceeded on the principle, that *Charles Grant* was entitled to set off the whole of the three legacies against the bond debt, from the time that the bonds were assigned to Sir *Alexander Grant*. In that alleged equity he failed; for the chancery in *Jamaica*, and the court of appeal in *England*, decided, that there was no right of set-off as to the two legacies of *Peter* and *James*. Having thus improperly delayed his creditor, he could not take advantage of his own wrong.

1827.
GRANT
v.
GRANT.

The LORD CHANCELLOR.

March 10.

With respect to the general jurisdiction, I entertain no doubt whatever, that, if a person, indebted in a sum of money by bond, files his bill for an injunction, stating that he is entitled, by reason of equitable circumstances, to be relieved from the obligation which presses him at law, and there is no neglect or default on the part of the Defendant, this Court has a right to consider the bond creditor as submitting to do equity, when he asks equity; and whatever abstruse and delicate reasoning there may be, as to whether the excess of the debt beyond the penalty is a specialty debt or a simple contract debt, this Court will find a way to give execution for the difference. On the other hand, if it were the creditor's own fault that he had not payment of his debt sooner, it would not be competent for him to take the benefit of the same rule.

The

(a) *Bunb.* 23.

(b) 6 *Ves.* 79—92.

(c) 1 *Sch. & Lef.* 414.

(d) 1 *Ball & B.* 238.

(e) 1 *Ball & B.* 262.

1827.

GRANT
v.
GRANT.

The LORD CHANCELLOR thought that the want of a personal representative of *Lindo* was not a ground for discharging the writ; and expressed his opinion, that the writ ought not to be marked for more than 8000*l*. There is, said his Lordship, a serious obligation in the Court to take care, if it computes the debt so as to carry the amount beyond the penalty of the bond, that it is satisfied that it has no doubt as to what it would do at the hearing of the cause. But I cannot admit that the writ is to be discharged altogether, because the amount, for which it is marked, ought to be lessened. According to the precedents in this Court, the party, who swears to his belief that a given sum is due to him as the balance of an account, is entitled to equitable bail. I cannot take away from the Plaintiff the benefit of his positive affidavit of belief. But it is the duty and practice of the Court, in such cases, to hear the Defendant in diminution of the *quantum* of demand; and, however troublesome and inconvenient such discussions may be, it is necessary to the ends of justice that they should be submitted to.

I have more difficulty now, than I had before, in acting on the notion of extending the debt beyond the penalties of the bonds. This may be a case in which, when judgment shall ultimately be given at the hearing, the debt may be extended beyond the penalty. But the injunction has been pending a great many years: it has never been dissolved; and can I now be so sure, that, at the hearing, the debt will be carried beyond the penalty, as to give the Plaintiff the benefit of an opinion to that effect against the liberty of the subject?

April 9.

Another question is, how far, in taking the account, *Charles Grant* has a right to a set-off in respect of the two legacies to his brothers.

In

1827.

GRANT

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GRANT.

In reference to these points, I wish to have a calculation which will shew me, first, what the result of the account will be, if the debt is not carried beyond the penalty; and, secondly, what the result will be, according *Charles Grant* has or has not credit, by way of set-off, for the legacies to his brothers.

Ultimately the writ was sustained; but the sum, for which it was marked, was reduced to 6500*l*.

AN
INDEX
TO
THE PRINCIPAL MATTERS.

ACCOUNT.

1. If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account cannot be directed in respect of his receipts during his infancy. *Hindmarsh v. Southgate.*

Page 324

2. *A.* had long employed *B.* as his steward, professional adviser, and general confidential agent; disputes having arisen between them, an agreement was entered into between *B.* and a clergyman acting on behalf of *A.*, by which a gross sum was to be paid to *B.* in lieu of all his claims, but no accounts or vouchers were rendered or produced by *A.*, nor was any bill of costs delivered; that agreement will not protect *B.* from rendering an account to his principal. *Jenkins v. Gould.* 385
3. Disputes existing between *A.* and his solicitor, receiver, and confidential agent *B.*, which involved long and intricate matters

of account, an authority was given by *A.* to a third person to settle any accounts in which he, *A.*, had an interest, and to compromise any claims which he might have: such an authority will not empower that third person to make an agreement, without the production or examination of any account, that a gross sum shall be paid to *B.* in lieu of all his demands on *A.* *Jenkins v. Gould.*

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See EXECUTOR, 6.

MORTGAGE, 1.

PRACTICE, 9.

ACQUIESCENCE.

See BARON AND FEMME, 2, 3.

ADMINISTRATION.

See ACCOUNT, 1.

AGENT.

See ACCOUNT, 2, 3.

AMICABLE SOCIETY.

See LIFE INSURANCE.

AN-

2. It is of no importance, in the question as to the priority of title acquired under the assignments, whether the interest of the vendor be vested or contingent, present or reversionary. *Dearle v. Hall. Loveridge v. Cooper.*

Page 1

3. *Semble, contra. Cooper v. Fynmore.* 60

4. In such cases the act of giving the trustee notice, is, in a certain degree, taking possession of the fund: it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. *Loveridge v. Cooper.* 58, 59

5. During the life of the tenant for life of a residue, a person, having a contingent reversionary interest in a share of it, assigned all her furniture, plate, &c. and all other the estate and effects, of or to which she was then possessed or entitled, to trustees, upon trust for her creditors; afterwards the interest became vested: this assignment did not pass her contingent interest in the residue. *Pope v. Whitcombe.*

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See BARON AND FEMME, 1, 2, 3.

MORTGAGE, 2.

PARTNERSHIP, 1.

AUCTION.

The equity of redemption of a lease for years, containing a covenant for perpetual renewal, is not an interest in real estate within the meaning of the 53 G. 3. c. 102.

s. 19.; and the assignee of an insolvent is not bound, under that section, to dispose of such an equity of redemption by public auction. *Waldron v. Howell.*

Page 376

AWARD.

In a suit instituted to enforce a pecuniary demand against the real and personal estate of a testator, an order was made by consent, referring all matters in difference between the parties in the cause to arbitration; and the arbitrators made an award, ordering the executors to pay a certain sum to the complainants, in full satisfaction of all their demands on him and his testator, but directing that certain other Defendants, who, under the testator's will, took interests in his real estate, should be at liberty to prosecute their claims against the testator's estate in like manner as if no order of reference had been made: the award was held not to be final, and was therefore set aside. *Turner v. Turner.* 494

BANKRUPT.

A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who has obtained his certificate, for the arrears

arrears of the annuity subsequent to the commission. *Watkins v. Flannagan.* Page 421

BARON AND FEMME.

1. Where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration. *Honner v. Morton.* 65
2. If the wife, after her husband's death, executes an assignment of the fund, which recites former assignments by the husband, and purports to be made subject to them, she does not thereby recognise or confirm those former assignments. *Honner v. Morton.* *Ibid.*
3. The wife does not acquiesce in those assignments, or waive her right to claim against them, by forbearing to impeach them till the death of the tenant for life. *Honner v. Morton.* *Ibid.*
4. The fund of a married woman, standing in the name of the accountant-general to her account, may be pledged by her husband. *Sansum v. Dewar.* 91
5. An annuity given to the separate use of the wife is discharged by payments made to the use of her husband and sums allowed him in account; the circumstances of

the transactions being such as to satisfy the Court, that the mode of dealing between the person, who was bound to pay the annuity and the husband was with the acquiescence of the wife, or with her authority, either express or implied. *Bartlett v. Gillard.*

Page 149

6. A *feme-covert*, tenant in tail in remainder of money to be laid out in land, by arrangement with the tenant for life, and on a private examination under the 7 G. 4. c. 45., consented to the payment of a proportion of the money to her husband; and the order was made accordingly. *In re Silcock's Estate.* 369

BIDDING, RESERVED.

See PRACTICE, 5.

BOND.

In a court of equity, a debt secured by bond may be carried beyond the penalty of the bond, if the debtor has by injunction restrained the creditor from proceeding at law, and there has been no misconduct on the part of the creditor. *Grant v. Grant.* 598

See LIEN, 1.

CHARGE.

See WILL, 2.

CREDITOR, 3.

CHARITY.

1. A fund given to a corporation in *England* for a charitable purpose,

- pose, ordered to be paid to the corporation, without the settlement of a scheme. *The Society for the Propagation of the Gospel in Foreign Parts v. His Majesty's Attorney-General.* Page 142
2. A Scotchman, by a will in the *English* form, made in *England*, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in *Scotland*, upon trust to lay out the same in the purchase of lands or rents of inheritance in fee simple, for the intent expressed in an instrument of even date with his will; and by that instrument, he directed the trustees of his will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of *Montrose*, to be by them applied to the relief of indigent ladies in *Montrose*, or within twenty miles of that town: Held, that the bequest was void under the mortmain act. *Attorney-General v. Mill.* 328
3. In the reign of *Henry VII.*, lands were given to the corporation of *Exeter* and their successors for the aid and relief of the poor citizens and inhabitants of *Exeter*, "who are heavily burthened by fee farm rents of that city, and other impositions and talliages:" the rents ought to be applied to the relief of the poor inhabitants of *Exeter* not receiving parish relief. *Attorney-General v. Corporation of Exeter.* 395
4. It is not a due administration of such a charity to apply the rents to the payment of fee farm rents due from the city, repairing the gaol, maintaining the prisoners, and other similar public purposes. *Attorney-General v. Corporation of Exeter.* Page 395
5. When, in consequence of a mistaken construction of a doubtful instrument, the rents of a charity estate have been for a series of years applied by a corporation to public purposes not warranted by the nature of the charity, the corporation will not be charged for such misapplication. *Attorney-General v. Corporation of Exeter.* *Ibid.*
6. The Court will not compel a corporation to produce their title deeds, and will not direct an inquiry as to the property which they possess applicable to general corporate purposes, in order to ascertain whether there is any fund which can be applied in making good a breach of trust committed by them in the management of charity funds. *Attorney-General v. Corporation of Exeter.* *Ibid.*
7. Upon an information to set aside a lease for ninety-nine years of charity lands, the Defendants, the lessees, set up a title adverse to the lease: upon the merits, it was held, that there was no ground for the defence; but the Court was of opinion, that, if the merits had been otherwise, the Defendants were estopped, and could not dispute the title, while they retained the possession. *Attorney-General v. Lord Hotham.* 415

8. A husbandry lease of charity lands for ninety-nine years, at an uniform rent, cannot be supported. *Attorney-General v. Lord Hotham.* Page 415

9. When a testator directs a sum to be laid out in building a church, the bequest is void; the rule of construction being, that a direction to build includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain. *Pritchard v. Arbouin.* 456

10. At a meeting held to appoint a successor to an office in a charity, after a candidate has been elected, and a minute of his election has been entered by the clerk, it is competent for the majority of the electors, before the meeting is dissolved, to reverse their vote, rescind the minute of election, and postpone the election to a subsequent day, provided, in so doing, they act *bond fide*, and with a view to the welfare of the charity. *Attorney-General v. Matthews.* 500

11. Provision for giving instruction in writing and arithmetic, introduced into a scheme for the administration and management of a free grammar school. *Attorney-General v. Haberdashers' Company.* 530

12. Provisions for instruction in English, writing, and arithmetic, made part of a scheme for the administration of a free grammar school. *Attorney-General v. Dixie.* 534

COMPROMISE.

1. Disputes existing between *A.* and his solicitor, receiver, and confidential agent *B.*, which involved long and intricate matters of account, an authority was given by *A.* to a third person to settle any accounts in which he, *A.*, had an interest, and to compromise any claims which he might have: such an authority will not empower that third person to make an agreement, without the production or examination of any account, that a gross sum shall be paid to *B.* in lieu of all his demands on *A.* *Jenkins v. Gould.* Page 385

2. A nephew, who was the heir-at-law and sole next of kin of a testator, having taken the opinion of counsel as to the widow's rights under her husband's will, and being advised that she took the residue absolutely, contracted to sell to her a house which had descended to him as heir; and part of the agreement was, that he should release all demands against her as executrix, or against her deceased husband's personal estate; according to the construction of the will adopted by the Court, the nephew was entitled to the residue absolutely, and in that residue was comprised, in the events which had happened, a large sum of stock, which had been the subject of the testator's marriage settlement: a general release, executed by the nephew in pursuance of the agreement with the widow,

widow, was held to be valid, and to vest the residue, including the stock, in the executrix absolutely, though it made no specific mention of the stock. *Collier v. Squire.* Page 467

CONVEYANCE.

See PRACTICE, 12.

COPYHOLD.

See COVENANT, 1.

ELECTION, 3.

LIEN, 2.

CORPORATION.

See CHARITY, 4, 5, 6.

COSTS.

1. Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage, after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mortgagee before the Court. *Barry v. Wray.* 465
2. An executor or trustee is not entitled to be allowed without question the amount of bills of costs which he has paid *bond fide* to the solicitor to the trust; and the Master, without regularly taxing the bills, will moderate their amount. *Johnson v. Telford.* 477
3. A bill of costs was delivered by the solicitor in 1809, and shortly afterwards paid by the client: between that time and March 1817, four other bills of costs were delivered, and various pay-

ments were made on account: in November 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating, that he would insist on having the bills taxed; an application for taxation to a Judge at law, in 1818, and an application to the Court of King's Bench in 1819, failed, from circumstances not involving the merits of the question: some attempts at a compromise were made from time to time; and the client was obliged on three or four occasions to leave *England*, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper: the Court ordered that the bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the Master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the Master should exercise as large a discretion as he might think fit with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Scougall v. Campbell.* Page 545

4. If any solicitor tells a client beforehand, that he will not undertake his business, if his bill is to be taxed; or if any solicitor, in the progress of a cause, gives his client to understand, that he

will go on with it or not go on with it, according as his bills are to be taxed or not to be taxed, a solicitor, so acting, will not be allowed to continue on the rolls. *Scougall v. Campbell.* Page 550

COVENANT.

A testator, having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life; and after his death, to the intent that the wife might receive annually a rent-charge, which was secured by powers of distress and entry, and by a term of years; and, subject to the rent-charge and the term, to the use of the settlor, his heirs and assigns; and he covenanted to surrender the copyholds to the uses of the settlement; the marriage was solemnized, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement: the covenant to surrender did not operate as an entire revocation of the devise of the copyholds, but was a revocation only so far as the particular purposes of the settlement required. *Vawser v. Jeffery.* 479

CREDITOR.

1. In a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the

executor in discharge of legacies, and had directed the fund in court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the Master subsequently reported a debt to be due to him; but, in the mean time, the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees: Held, that the creditor was entitled to receive, out of the funds of the legatees so remaining in court, not the whole of the debt, but only a part of it, bearing the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. *Gillespie v. Alexander.* Page 180

2. An admission of a debt by the executrix of a trader, within six years before the filing of a creditor's bill, will not take the debt out of the statute of limitations, so as to make it, under the 47 G. 3. c. 74., a charge on the real estate in the hands of a devisee. *Putnam v. Bates.* 188

3. Where a testator directs his just debts and funeral expenses to be fully paid and satisfied by his executor thereafter named, it is a condition imposed upon the executor to satisfy the testator's debts and funeral expenses, as far as all the property, which he derives under the testamentary disposition, will extend, whether real or personal. *Henvell v. Whitaker.* 343

4. A

4. A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay his son's debts, and named the son of his son his residuary devisee and legatee. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay. *Walker v. Lodge.* Page 459

See EXECUTOR, 6.

WILL, 2.

CUSTOMARY LANDS.

1. By the custom of the manor of *Shap*, the legal interest in lands of customary tenure, parcel of the manor, was not devisable, but was transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words were, "bargain, sell, and surrender," and, on the presentment or production of which, admittance was granted to the alienee; but an equitable interest in such customary lands was capable of being passed by devise without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them by a deed of bargain, sale, and surrender, to a trustee, upon trust for such person as the tenant, by any deed or instrument in writing, or by his last will, or any codicil thereto, or any instrument in the

nature of a last will or codicil, to be by him legally executed, should appoint or devise the same; and under this conveyance the trustee was admitted: Held, that the equitable interest in the lands would not pass by an unattested codicil. *Willan v. Lancaster.* Page 108

DEBTS.

See CREDITOR.

DECREE.

- A sum of stock claimed as a legacy by *A.*, was ordered by the decree to be carried over to the account of *A.*, "subject to the further order of the Court," with a direction that it should not be sold or transferred without notice to *B.*: Held, that the Court might, upon petition and without rehearing the former decree, order the money to be paid to *B.*, if his title appeared to be better than that of *A.* *Barksdale v. Abbott.* 186

See PRACTICE, 5.

DEVISE.

1. Circumstances under which a new trial of an issue of *devisavit vel non* will be directed. *Winchilsea v. Wauchope. Tod v. Winchilsea.* 441
2. A third trial of an issue of *devisavit vel non* directed, after two juries had found in favour of the will. *Ibid.*
3. *Quære*, Whether, in a question between a devisee and an heir-at-

S s 3

law,

law, the Court will bind the inheritance by the result of one trial.

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See ESTATE.

POWER.

WILL.

DISMISSAL OF A BILL.

See PRACTICE, 6.

DOWER.

See ELECTION, 1.

ELECTION.

1. A testator, after bequeathing to his wife an annuity, charged on his estate at S., with power of entry and distress, if it should be in arrear for thirty days, and giving other legacies and annuities, which he charges on his lands at S. in aid of his personal estate, gives and devises all his real and personal property to trustees, upon certain trusts; and he directs them to occupy and manage, during the minority of his son, a farm constituting the greater part of his estate at S., and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates: Held, that the widow must be put to elect between her dower and the benefits given her by the will. *Roadley v. Dixon.* 192

2. A., being tenant for life of a leasehold for years, with remainder to B., after devising one estate to B. in tail, bequeathed to him the leasehold during his life, with re-

mainders over, and gave him also the residue of his real and personal property. B. took possession of the residuary estate; suffered a recovery of the lands devised to him in tail; acted as the absolute owner of the leasehold estate, and outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises: Held, that B. had elected to take under the will, and was bound to give effect to the devise of the leasehold in favour of the remainder-man. *Giddings v. Giddings.* Page 241

3. A testator, being absolute owner of some copyholds, of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor, to which he had not been admitted, but subject to trusts, under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered to the use of his will all his copyholds, holden of that manor, or which he was seised of, or entitled to, either in possession, reversion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainders over: Held, that the

the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the deviser was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts, to which some of the copyholds were subject. *Abdy v. Gordon.*

Page 278

4. Previous to marriage, the fortune of the wife is so settled as, in the event of her surviving her husband, to belong to her absolutely; by other deeds of the same date, the husband makes a settlement of his property, under which certain interests are given to the wife; he dies in her lifetime, having, by his will, bequeathed to her considerable benefits, which, he directs, shall be in satisfaction of all her claims or demands against his estate or executors under the settlement made by him, or on any other account whatsoever: the acceptance of the benefits given to her by the will does not preclude the wife from claiming a leasehold, part of her own fortune, which the husband was bound to renew in the names of the trustees and upon the trusts of her settlement, but which he had renewed in his own name. *Coleman v. Jones.*

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See SPECIFIC PERFORMANCE, 1.

ELECTION TO AN OFFICE.

1. At a meeting held to appoint a successor to an office in a charity, after a candidate has been elected, and a minute of his election has been entered by the clerk, it is competent for the majority of the electors, before the meeting is dissolved, to reverse their vote, rescind the minute of election, and postpone the election to a subsequent day, provided, in so doing, they act *bonâ fide*, and with a view to the welfare of the charity. *Attorney-General v. Matthews.* Page 500

ESTATE.

1. A testator, after giving his wife an annuity for her life, to be issuing out of "all his real estate, lands, and hereditaments in *P.*," devised "the said estate, lands, and hereditaments" to his daughter and her heirs; but in case his daughter died under twenty-one, and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and after her decease, to the children of *A.*, share and share alike: Held, that, subject to the previous interests given to the daughter and to the wife, the children of *A.*, living at the testator's death, took an estate in fee in the lands in *P.* *Wilkinson v. Chapman.* Page 145
2. A devise of lands to *A.* "for paying his son 50*l.* when of the age of twenty-one years," gives *A.* the fee beneficially, charged

S s 4

with

with the payment of 50*l.* *Abrams v. Winshup.* Page 350

EVIDENCE.

1. A Plaintiff may read evidence to disprove an allegation contained in a passage of the Defendant's answer, which he has read. *Price v. Lytton.* 206
2. In a suit by the assignee of an insolvent to impeach a sale which a former assignee had made of an equity of redemption, the insolvent is not rendered a competent witness for the Plaintiff by releasing his interest in the residue of his estate. *Waldron v. Howell.* 376
3. Though mere nonpayment of tithes, for however long a period, would not be evidence of a grant, yet a layman's adverse enjoyment or pernancy, for a long series of years, of the tithes of certain lands, or of a money-payment in lieu of tithes, coupled with a succession of deeds by which the tithes or money-payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. *Bacon v. Williams.* 525

EXECUTOR.

1. A testator, beginning his will by expressing an intention to give the bulk of his property to two of his sisters, gave them only a life interest in the greater part of it; and, after giving legacies to others of his sisters, he expressed

his wish, that *A.*, and his, the testator's, servant *B.* should be his executors, and that *B.* should live with his two sisters, and take care of them and their property; and by a codicil, he directed that the interest of 300*l.* should be paid to *B.* half-yearly, as wages for taking care of his two sisters; and that, after the death of *B.* and his two sisters, the 300*l.* should be paid to *P.*: Held,

That the legacy given to *B.* by the codicil was not a legacy given to her for her care and trouble, so as to convert her into a trustee of the residue for the next of kin, but that *A.* and *B.*, in their character of executors, took the residue beneficially;

That, after the death of the two sisters, though the services, for which the legacy was given as wages, could no longer be performed, *B.* would still be entitled to the interest of the 300*l.* during her life. *Dawson v. Thorne.*

Page 235

2. An executrix, who, in mistake, makes payments to an annuitant in respect of his annuity, before it commences, is entitled to retain them out of the future payments of the annuity: and

An order, authorising her to retain them, and made upon petition, after the decree has been passed and entered, is regular. *Livesey v. Livesey.* 287

3. Where a testator directs his just debts and funeral expenses to be fully paid and satisfied by his executor thereafter named, it is, a condition imposed upon the executor

executor to satisfy the testator's debts and funeral expenses, as far as all the property, which he derives under the testamentary disposition, will extend, whether real or personal. *Henvell v. Whitaker.* Page 343

4. By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and, after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should by deed or will appoint; and in default of appointment, for his executors and administrators: the husband died in the wife's lifetime, having appointed an executrix, but without exercising his power: Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate. *Collier v. Squire.* 467

5. The husband by his will bequeathed as follows: — "And unto my wife (whom I make full and wholly executrix) I give my house, with all my household furniture, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses:" Held, that the beneficial interest in the settled stock did not pass to the wife. *Collier v. Squire.* 467

6. If an executor, acting *bond fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4l. per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors. *Spode v. Smith.* Page 511
See COSTS, 2.

FOREIGN CHARITY.

See CHARITY, 2.

GENERAL RELIEF.

See PLEADING, 1, 2.

ILLEGITIMACY.

1. A testator devised his real and personal property to trustees, upon trust for four children of *Martha Davies*, whom he described by their respective names, "together with every other child born of the body of *Martha Davies*

Davies alive at my decease, or born within nine months afterwards, share and share alike :” *Martha Davies* had two other children born after the date of the will, but before the date of a codicil to it ; and these, as well as the four previously born, were all illegitimate. The children, born after the date of the will, are not entitled to any share of the property. *Mortimer v. West.*
Page 370

INFANT.

If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account cannot be directed in respect of his receipts during his infancy. *Hindmarsh v. Southgate.* 324

INJUNCTION.

1. A Plaintiff cannot move *ex parte* for an injunction, after he has served the Defendant with *sub-pœna*, and the Defendant has appeared. *Perry v. Weller.* 519
2. In a court of equity, a debt secured by bond may be carried beyond the penalty of the bond, if the debtor has by injunction restrained the creditor from proceeding at law, and there has been no misconduct on the part of the creditor. *Grant v. Grant.* 598
3. A writ of *ne exeat regno* granted at the suit of a person equitably entitled to the sum due on certain bonds, though the transactions, out of which the demand arose, took place in *Jamaica*, between

parties resident there, and were the subject of suits in that island, and though in one of those suits an injunction issued, restraining the person, whom the present Plaintiff represented, from proceeding on the bonds at law ; the Court, considering the injunction, though never dissolved, as substantially superseded by subsequent proceedings. *Grant v. Grant.* Page 598
See POWER, 4.

INSOLVENT DEBTOR.

1. The equity of redemption of a leasehold for years, with a covenant for perpetual renewal, is not an interest in real estate within the meaning of the 53 G. 3. c. 102. s. 19. *Waldron v. Howell.* 376
2. The assignee of an insolvent is not bound, under that section, to dispose of such an equity of redemption by public auction. *Waldron v. Howell.* 376

INTEREST.

When a legacy is not paid at the time appointed by the testator, legacy-duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee. *Thomas v. Montgomery.* 502

INTERPLEADER.

In an interpleading suit, the Court will order the money, which has been brought in by the Plaintiff, to be paid to a person having authority

authority from all the Defendants to receive it, though some of the Defendants have not appeared: and for that purpose a reference will be directed to the Master to inquire whether a sufficient authority to receive the money has been given. *Powell v. Sonnet.* Page 556

ISSUE.

1. Where a party wishes to obtain a new trial of an issue, he must first, on an *ex parte* application, satisfy the Judge in equity, that there is a reasonable ground for sending to the Judge, who tried the issue, for his notes of the trial. *Morris v. Davies.* 318
2. Circumstances under which a new trial of an issue of *devisavit vel non* will be directed. *Winchilsea v. Wauchope. Tod v. Winchilsea.* 441
3. A third trial of an issue of *devisavit vel non* directed, after two juries had found in favour of the will. *Ibid.*
4. *Quære*, Whether, in a question between a devisee and an heir-at-law, the Court will bind the inheritance by the result of one trial. *Ibid.*

JAMAICA.

See NE EXEAT, 2. 5.

JOINT INSTRUMENTS.

Semble, where the parties intended that a promissory note should be joint and several, but, through ignorance, it is expressed to be

joint only, a court of equity will relieve as well against the surety, as against the principal.

But where a joint promissory note, signed "J. and J. E. — J. P., surety," was given to a creditor of the firm of J. and J. E., and J. P. died, J. and J. E. being both alive, one of whom afterwards became bankrupt, while the other quitted the country insolvent: Held, that the promissory note could not be considered as several against J. P., the surety. *Rawstone v. Parr.*

Page 424. 539

JUDGMENT.

Judgments not docketed have no preference against heirs, executors, or administrators. *Landon v. Ferguson.* 349

JURISDICTION.

1. A court of equity will not appoint a receiver of rates, which are to be assessed by commissioners and collected at a future period. *Drewry v. Barnes.* 94
2. A court of equity will not interfere in favour of a party, who omits to avail himself of his legal remedy in due time. *Drewry v. Barnes.* *Ibid.*
3. A court of equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest, which he neglected to claim at the time when they became due. *Drewry v. Barnes.* *Ibid.*
4. Clauses in a local act, providing that persons aggrieved by the commissioners, appointed to carry it

it into execution, should appeal to the quarter sessions, and that twenty-one days' notice should be given before any action or suit was commenced for any thing done in pursuance of the act, do not apply to the case of a person claiming as an incumbrancer of the rates which the act gave authority to assess and levy, and instituting his suit in order to give effect to his incumbrance. *Drewry v. Barnes.*

Page 94

5. Where a tribunal determines in a matter not within its jurisdiction; the decision is a nullity. *Attorney-General v. Lord Hotham.* 415

6. The general principle of a court of equity is, that a bill in equity may be filed for the delivery up of an instrument which cannot be enforced at law, in order that the Plaintiff may not be harassed by vexatious proceedings at law. *Grover v. Hugell.* 432

LACHES.

See JURISDICTION, 2, 3.

LAND-TAX.

1. Surplus stock, arising from sales under the acts for the redemption of the land-tax, will be ordered to be transferred to the party, who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee. *In the Matter of Fortescue.* 128
2. A person who has entered into

an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land-tax, is not bound to complete his purchase, when it appears that, upon the prior sale for the redemption of the land-tax, the rector himself was the actual purchaser, in the name of his curate. *Grover v. Hugell.*

Page 428

LAPSE.

See LEGACY, 2.

LEASEHOLDS.

1. A testator, seised of estates in fee, and holding certain lands and tithes in the county of *H.* under church-leases for lives, devised all his lands and hereditaments in the counties of *H.* and *G.*, and all other his real estate, to his daughter and the heirs of her body; and for default of such issue, to *F.* and his heirs. The daughter, at the testator's death, and ever afterwards, was of unsound mind. Her husband, having taken out administration to the testator, with the will annexed, procured, from time to time, renewals of the leases. She survived him, as well as all the *cestuis que vie* named in the testator's leases, and died without issue, and without having done any act to bar such interest as *F.* had under the devise. Held,

That the leaseholds for lives passed by the will: and,

That *F.* was entitled to the benefit of the subsisting leases, which

- which had been obtained by way of renewal of the old leases. *Fitzroy v. Howard.* Page 225
2. If a tenant for life of an underlease for eighteen years, granted by a person who himself holds the premises so underlet, along with other property, under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the underlease, to the same trusts, as would have affected the underlease, if it had not been merged or had not expired by the effluxion of time. *Giddings v. Giddings.* Page 241
 3. The same rule holds, though the lease at the time of the purchase was vested in a trustee, upon trusts, under which he could not have granted a renewal of the underlease, and though the tenant for life outlived, by twenty-five years, the time at which the underlease would have expired by effluxion of time. *Giddings v. Giddings.* *Ibid.*
 4. The equity of redemption of a leasehold for years, with a covenant for perpetual renewal, is not an interest in the real estate within the meaning of the 53 G.3. c. 102. s. 19. *Waldron v. Howell.* 376
 5. The assignee of an insolvent is not bound, under that section, to dispose of such an equity of redemption by public auction. *Waldron v. Howell.* *Ibid.*
 6. Upon an information to set aside a lease for ninety-nine years of charity lands, the Defendants, the lessees, set up a title adverse to the lease: upon the merits, it was held, that there was no ground for the defence; but the Court was of opinion, that, if the merits had been otherwise, the Defendants were estopped, and could not dispute the title, while they retained the possession. *Attorney-General v. Hotham.* Page 415
 7. A husbandry lease of charity lands for ninety-nine years, at an uniform rent, cannot be supported. *Attorney-General v. Ld. Hotham.* *Ibid.*
 8. Premises, held under distinct leases, ordered to be sold in one lot, upon the speculative probability arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots. *Cook v. Collingridge.* 520
See NOTICE.

LEGACY.

1. In a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the Master subsequently reported a debt to be due to him; but, in the mean time, the fund had been apportioned, and part

part of it had been paid over, while the remainder had been carried to the account of particular legatees: Held, that the creditor was entitled to receive, out of the funds of the legatees so remaining in court, not the whole of the debt, but only a part of it, bearing the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. *Gillespie v. Alexander.*

Page 130

2. A legacy was given to the separate use of a married woman during the joint lives of her and her husband, and in case she survived him, to her absolutely, but if she did not survive him, to such person as she should by will appoint, and, in default of appointment, to her next of kin, exclusive of her husband: She died in the lifetime of her husband and the testator: Held, that the legacy lapsed. *Baker v. Hanbury.* 340

See EXECUTOR, 6.

MAINTENANCE, 1, 2.

LEGACY DUTIES.

- When a legacy is not paid at the time appointed by the testator, legacy-duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee. *Thomas v. Montgomery.* 502

LIEN.

1. By an agreement for the sale of an estate, the purchase-money,

with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase-money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest, within twelve months after the death of the vendor, and of interest in the mean time. The vendor was held to have a lien on the estate for the amount of the bond. *Winter v. Lord Anson.*

Page 488

2. There is no distinction between copyholds and freeholds, as to the doctrine of a vendor's lien for his purchase-money. *Winter v. Lord Anson.* 492

LIFE INSURANCE.

In the policies effected by the Amicable Society, there is no exception as to death by the hands of justice: a person, insuring his life in that office, afterwards suffered death for a criminal offence: the policy was not thereby avoided. *Bolland v. Disney.* 351

LIMITATIONS, STATUTE OF.

An admission of a debt by the executrix of a trader, within six years before the filing of a creditor's bill, will not take the debt out of the statute of limitations,

so as to make it, under the 47 G. 3. c. 74., a charge on the real estate in the hands of a devisee. *Putnam v. Bates.*

Page 188

MAINTENANCE.

1. A testator devises the residue of his real and personal estate to such of his children as shall attain twenty-one, or marry under that age, with consent. All the children are entitled, although their interests are wholly contingent, to have allowances, out of the residue, for their maintenance during their minorities. *Brown v. Temperley.* Page 263
2. An allowance out of a residue, which was directed to be accumulated, made for the support of a legatee, in the interval between the time when the legatee attained his full age, and the time fixed for the distribution of the accumulated fund. *M'Dermott v. Kealy.* 264

MARRIAGE SETTLEMENT.

1. In contemplation of a marriage between *A.* and *B.*, settlements were made of real estate belonging to *B.*, the intended wife, and of personalty belonging to *A.*, the intended husband, upon uses and trusts, which, after the solemnization of the marriage, were to arise for the benefit of the husband and wife, and their issue; the marriage ceremony was performed, and the parties lived together as husband and wife, but after the lapse of more

than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlements; some time afterwards a new settlement, in contemplation of marriage, was made, including the same property as the former, but different from the former in the interests given to the issue, as well as in other provisions; the parties then intermarried, and there was issue of the marriage: Held,

That the first settlement, being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personalty, were regulated by the second settlement. *Robinson v. Dickinson.* Page 399

2. By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and, after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should by deed or will appoint; and in default of appointment, for his executors and administrators: the husband died in the wife's lifetime, having appointed an executrix, but without exercising his power: Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate. *Collier v. Squire.* 467

MIS-

MISTAKE.

See MARRIAGE SETTLEMENT, 1.
SURETY, 2.

MORTGAGE.

1. A mortgagee is entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage-money. *Ellison v. Wright.* Page 458
2. Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mortgage before the court. *Barry v. Wray.* 465
3. The heir of a mortgagee, to whom the legal estate in the mortgaged premises has descended, is a necessary party to a bill of foreclosure filed by the executor of the mortgagee. *Scott v. Nicoll. Hampson v. Nicoll.* 476

MORTMAIN.

1. When a testator directs a sum to be laid out in building a church, the bequest is void; the rule of construction being, that a direction to build includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain. *Pritchard v. Arbouin.* 456
- See CHARITY, 2.

NE EXEAT.

1. A writ of *ne exeat regno* discharged with costs, where, upon the affidavit of the Plaintiff and the answer of the Defendant taken together, there was a strong *prima facie* case, that nothing was due from the Defendant to the Plaintiff. *Leo v. Lambert.* Page 417
2. The writ of *ne exeat regno*, granted at the suit of a person equitably entitled to certain bonds, though the transactions, out of which the demand arose, took place in *Jamaica*, between parties resident there, and were the subject of suits in that island, and though in one of those suits an injunction issued, restraining the person, whom the present Plaintiff represented, from proceeding on the bonds at law; the Court, considering the injunction, though never dissolved, as substantially superseded by subsequent proceedings. *Grant v. Grant.* 598
3. A writ of *ne exeat regno* granted at the suit of a person equitably entitled to the sum due on certain bonds, though the personal representative of the trustee, to whom they had been assigned in trust for him, was not a party to the suit. *Grant v. Grant. Ibid.*
4. A writ of *ne exeat regno* will not be discharged, though it appears to have issued for a sum greatly exceeding that for which it can be sustained; but the amount, for which it is marked, will be reduced. *Grant v. Grant. Ibid.*
5. A

5. A writ of *ne exeat regno* will be granted in respect of a debt which was contracted in *Jamaica* between persons resident there, though in *Jamaica* the Defendant could not be arrested for the demand. *Grant v. Grant*.

Page 598

6. A defendant in custody under a *ne exeat regno* is not bound to answer, before he moves to discharge the writ. *Grant v. Grant*.
Ibid.

NOTICE.

A. made a voluntary surrender of copyholds to a trustee upon trust for F. during her life, and if, at her death, she left children who attained twenty-one, upon trust to sell and divide the money among them; and if that event did not take place, upon trust for A. in fee. Afterwards, by a deed, reciting that the trustee was seised of the premises upon trust for F. and her husband and A., the trustee, and F. and her husband, and A. concurred in demising the premises, for a valuable consideration, to G. for a long term of years: Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of F., and that the lease was void as against them. *Malpas v. Ackland*.
273

See ASSIGNMENT, 1.

PARISH RATES.

1. A court of equity will not appoint a receiver of rates, which
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are to be assessed by commissioners and collected at a future period. *Drewry v. Barnes*.

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2. A court of equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest, which he neglected to claim at the time when they became due. *Drewry v. Barnes*.
Ibid.

PARISH RELIEF.

See CHARITY, 3.

PARTIES.

1. Where a bill was filed against the devisee of a lease, praying that the lease might be declared void, and the Defendant insisted that, if the lease was set aside, the Plaintiffs ought to repay the monies expended by his devisor in the improvement of the premises, the executor of the devisor, who had assented to the devise of the lease, was not a necessary party to the suit. *Malpas v. Ackland*.
273
2. The heir of a mortgagee, to whom the legal estate in the mortgaged premises has descended, is a necessary party to a bill of foreclosure filed by the executor of the mortgagee. *Scott v. Nicoll*. *Hampson v. Nicoll*.
476
3. *Semble*, Where the *cestuis que trust* convey their beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the

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cestuis que trust, who sold to him, parties to the suit. *Goodson v. Ellisson*. Page 583

PARTNERSHIP.

A., being, as a partner, entitled to a share of extensive iron-works, and of the lands and premises on which they were carried on, agreed, for valuable consideration, to assign to *B.* his interest in the property and business: *B.* interfered and acted as a partner; but afterwards he assigned his share, and gave notice to the other partners that he had withdrawn from the business; and, when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shewn: Held,

That *B.*, as between him and the other partners; was to be treated as a partner, and was to contribute to the partnership losses, until the time when he gave notice of his withdrawal from the concern, and assigned his share:

That his liability ceased upon his assigning his share, and giving notice to the other partners of his withdrawal from the concern:

That the assignment of his share, though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability:

That the assignee, not having been acknowledged a partner, or permitted to act as such, did not, by his acceptance of the assignment, incur any liability as be-

tween himself and the co-partners. *Jefferys v. Smith*.

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PAUPER.

See PRACTICE, 8.

PAYMENT OF MONEY.

In an interpleading suit, the Court will order the money, which has been brought in by the Plaintiff, to be paid to a person having authority from all the Defendants to receive it, though some of the Defendants have not appeared: and for that purpose a reference will be directed to the Master to inquire, whether a sufficient authority to receive the money has been given. *Powell v. Sonnet*. 556

See PRACTICE, 2.

PLEADING.

1. The vendor of a share in a co-partnership business, filed a bill against the purchaser who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically; the Court was of opinion that the title had not been accepted, and, as a good title was not shewn, a specific performance could not be decreed:

Held, that upon a record so framed, no accounts or inquiries could be directed as to the defendant's possession and management of the property, with a view to

to ascertain whether any and what sum ought to be paid, or compensation made, by him to the plaintiff. *Stevens v. Guppy*.

Page 171

2. On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, and, pending the suit, continued in possession until 1823, the Plaintiff, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the Court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated by his answer that he was willing to pay a fair rent. *Williams v. Shaw*. 178

3. *Semble*. A plaintiff ought never to come into a court of equity to have an alleged defect in the execution of a power supplied, without admitting on the record that, at law, the power has not been well executed. *Cockerell v. Cholmeley*. 565

See PARTIES.

POLICY.

See LIFE INSURANCE.

POOR.

In the reign of *Henry VII.* lands were given to the corporation of *Exeter* and their successors, for the aid and relief of the poor citizens and inhabitants of *Exeter*, "who are heavily burthened by fee farm rents of that city, and other impositions and talliages:" the rents ought to be applied to

the relief of the poor inhabitants of *Exeter* not receiving parish relief. *Attorney-General v. Corporation of Exeter*. Page 395

PORTIONS.

By a marriage settlement, a sum of 4000*l.* was to go, after the decease of the husband and the wife, and the husband's father, and subject to the father's power of appointment, to the children of the marriage equally; and the real estates of the wife were charged with a sum of 8000*l.*, which was to be divided among the children, in such shares and manner as she should appoint. The wife, by her will, appointed 100*l.* to the eldest son of the marriage, and the remaining 7900*l.* to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters, on their attaining that age, or marriage with their father's consent; she likewise created a further charge, in order that each younger child's share of the 8000*l.* might be augmented to 5000*l.*; and, by the same instrument, she, in exercise of a power of appointment, which she had under the will of C., appointed C.'s residuary property to the first and other sons of the marriage successively, who should attain twenty-one; and if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given

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to

to any child or children of whom she might be delivered, as was given by her will to each of her daughters, and that, if no son of the marriage should live to attain twenty-one or be married, each of her daughters should be entitled to have for her fortune 10,000*l.*, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son and three daughters her surviving; and in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the 4000*l.*, and, under their mother's appointment, to the residuary property of C.: Held,

That they were entitled to receive 10,000*l.*, exclusive of, and in addition to, their shares of the 4000*l.* and of the residuary property of C. *Whyte v. Kearney*.

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POWER.

1. Where, under a settlement, a testator had, in a certain event, the fee of an estate, subject to a term, and had, under the same settlement, a power, in the particular event, to appoint the fee, subject to the term, by deed or will, and by his will he devised the estate in fee, without reference to his power, the will took effect as a devise of his interest, and not as an execution of his power. *Farmer v. Bradford*. 354
2. By the same settlement he had, in the events which happened, a power to appoint a sum of 1000*l.*, which was to be raised after his death by the term to which the fee of the same estate was subject; but his will took no notice of this power: the devise of the estate did not operate as an execution of the power to appoint the 1000*l.* *Farmer v. Bradford*.
Page 354
3. A general devise of all lands of which the testatrix had power to dispose, is not a good execution of a power to appoint monies, which were to arise from the sale of land. *Adams v. Austen*.
461
4. Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and, in the mean time, to invest it in the public funds, and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed
was

was executed, by which he, in consideration of 2448*l.*, conveyed the timber to the purchaser, and the trustee, in consideration of 13,400*l.*, conveyed the land exclusive of the timber. The mistake being afterwards discovered, the tenant for life transferred to the trustee as much 3 per cent. stock as the valuation of the timber would have produced at the time of the sale. After the death of *A.*, the next remainderman, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment, on the ground that the power was not well executed: Held, that a court of equity ought not to interfere by injunction to deprive him of the benefit of that judgment. *Cockerell v. Cholmeley.* Page 565

5. *Semble.* A Plaintiff ought never to come into a court of equity to have an alleged defect in the execution of a power supplied, without admitting on the record, that, at law, the power has not been well executed. *Cockerell v. Cholmeley.* *Ibid.*

PRACTICE.

1. Where a passage, read by a Plaintiff from an answer, refers to another passage, that other passage is to be read only for the purpose of explaining or qualifying the thing in respect of which the reference is made, and not

for the purpose of introducing new facts, which do not explain or qualify that thing, though such new facts be connected, in grammatical construction, with that which must be read. *Bartlett v. Gillard.* Page 149

2. An executrix, who, in mistake, makes payments to an annuitant in respect of his annuity before it commences, is entitled to retain them out of the future payments of the annuity: and

An order, authorising her to retain them, and made upon petition, after the decree has been passed and entered, is regular. *Livesey v. Livesey.* 287

3. Where a party wishes to obtain a new trial of an issue, he must first, on an *ex parte* application, satisfy the Judge in equity, that there is a reasonable ground for sending to the Judge, who tried the issue, for his notes of the trial. *Morris v. Davies.* 318

4. A sum of stock claimed as a legacy by *A.*, was ordered by the decree to be carried over to the account of *A.*, "subject to the further order of the Court," with a direction that it should not be sold or transferred without notice to *B.*: Held, that the Court might, upon petition and without rehearing the former decree, order the money to be paid to *B.*, if his title appeared to be the better of the two. *Barksdale v. Abbott.* 186

5. A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to

be the subject of a separate order. *Brooker v. Collier.*

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6. A Defendant may dismiss a bill for want of prosecution, pending a notice given by him of a motion to dissolve an injunction, which the Plaintiff had obtained. *Farquharson v. Pitcher.* 383
7. *Semble.* An order of reference to the Master, on a petition presented under Lord *Eldon's* act, ought not to be made, except on a hearing in Court, and on the appearance of counsel upon the petition: *Hinde v. Metcalf.* 416
8. In pauper suits, the Court will not compel a solicitor to act for the pauper; but the course is, to assign to him counsel and a six-clerk; and it is the duty of the six-clerk to appoint one of the sixty clerks of his office to act on the part of the pauper. *Lewis v. Kennett.* 466
9. *Quære,* Whether, upon a petition objecting to a Master's report of a receiver's accounts, the Court will enter into a consideration of the particular items of the accounts. *Shewell v. Jones.* 522
10. Even where there is reason to doubt whether, as to some points, the conduct of a receiver has been strictly correct, further inquiry will not be ordered, where the attention of the parties has been previously directed to the subject, and ample opportunity of investigation afforded to them. *Shewell v. Jones.* *Ibid.*
11. In an interpleading suit, the Court will order the money, which has been brought in by the Plaintiff, to be paid to a person having authority from all the Defendants to receive it, though some of the defendants have not appeared: and for that purpose a reference will be directed to the Master to inquire, whether a sufficient authority to receive the money has been given. *Powell v. Sonnett.* Page 556
12. The Court will not, on the application of a tenant for life, direct an inquiry, whether it would be for the benefit of all parties interested in the property, that certain permanent and substantial improvements should be made in the mansion-house. *Nairn v. Marjoribanks.* 582
13. *Semble,* A trustee under an old trust, creating successive limitations of equitable interests, some of which had failed, is entitled, before he can be required to convey, to have the equitable title of those who call for a conveyance ascertained by inquiry, and to have the deed of conveyance settled in the Master's office. *Goodson v. Ellisson.* 583
14. A writ of *ne exeat regno* will not be discharged, though it appears to have issued for a sum greatly exceeding that for which it can be sustained; but the amount, for which it is marked, will be reduced. *Grant v. Grant.* 598
15. A writ of *ne exeat regno* will be granted in respect of a debt which was contracted in *Jamaica* between persons resident there, though in *Jamaica* the Defendant

ant could not be arrested for the demand. *Grant v. Grant.*

Page 598

See COSTS.

INJUNCTION.

PRIORITY.

1. A person, having a beneficial interest in a sum of money invested in the names of trustees, assigns it for valuable consideration to *A.*, but no notice of the assignment is given to the trustees; afterwards, the same person proposes to sell his interest to *B.*, and *B.*, having made inquiry of the trustees as to the nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase, and gives the trustees notice; *B.* has a better equity than *A.* to the possession of the fund, and the assignment to *B.*, though posterior in date, is to be preferred to the assignment to *A.* *Dearle v. Hall.* *Loveridge v. Cooper.* 1
2. A sum of stock claimed as a legacy by *A.*, was ordered by the decree to be carried over to the account of *A.*, "subject to the further order of the Court," with a direction that it should not be sold or transferred without notice to *B.*: Held, that the Court might, upon petition and without rehearing the former decree, order the money to be paid to *B.*, if his title appeared to be the better of the two. *Barksdale v. Abbott.* 186
3. Judgments not docketed have no

preference against heirs, executors, or administrators. *Landon v. Ferguson.* Page 349

PROMISSORY NOTES.

See JOINT INSTRUMENTS.

RECEIVER.

1. A court of equity will not appoint a receiver of rates, which are to be assessed by commissioners and collected at a future period. *Drewry v. Barnes.* 94
2. A receiver of tolls appointed. *Dumville v. Ashbrook.* 98
3. *Quære*, Whether, upon a petition objecting to a Master's report of a receiver's accounts, the Court will enter into a consideration of the particular items of the accounts. *Shewell v. Jones.* 522
4. Even where there is reason to doubt whether, as to some points, the conduct of a receiver has been strictly correct, further inquiry will not be ordered, where the attention of the parties has been previously directed to the subject, and ample opportunity of investigation afforded to them. *Shewell v. Jones.* *Ibid.*

RECTORY.

See LAND-TAX, 2.

RENEWAL.

1. A testator, seised of estates in fee, and holding certain lands and tithes in the county of *H.* under church-leases for lives, devised all his lands and hereditaments in the counties of *H.* and

G., and all other his real estate, to his daughter and the heirs of her body; and for default of such issue, to F. and his heirs. The daughter, at the testator's death, and ever afterwards, was of unsound mind. Her husband, having taken out administration to the testator, with the will annexed, procured, from time to time, renewals of the leases. She survived him, as well as all the *cestuis que vie* named in the testator's leases, and died without issue, and without having done any act to bar such interest as F. had under the devise. Held,

That the leaseholds for lives passed by the will: and

That F. was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases.

Fitzroy v. Howard. Page 225

2. If a tenant for life of an underlease for eighteen years, granted by a person who himself holds the premises so underlet, along with other property, under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the underlease, to the same trusts, as would have affected the underlease, if it had not been merged or had not expired by the effluxion of time.

Giddings v. Giddings. 241

3. The same rule holds, though the

lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the underlease, and though the tenant for life outlived, by twenty-five years, the time at which the underlease would have expired by effluxion of time. *Giddings v. Giddings.* Page 241

4. Decree against a corporation to grant a new lease according to a covenant for perpetual renewal, though the whole of the reserved rent had been for many years applied uniformly to one charitable purpose. *Gozna v. The Alderman and Burgesses of Grantham.* 261

See ELECTION, 4.

LEASEHOLD, 4.

REVERSIONARY INTEREST.

1. Where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration. *Honner v. Morton.* 65
2. During the life of the tenant for life of a residue, a person, having a contingent reversionary interest in a share of it, assigned all her furniture, plate, &c. and all other the estate and effects of or to which she

she was then possessed or entitled, to trustees, upon trust for her creditors: afterwards the interest became vested: the assignment did not pass her contingent interest in the residue. *Pope v. Whitcombe.* Page 124

3. The rule, that the purchaser of a reversion must prove that he gave a full price, has so long been considered as settled, that it can be altered only by the House of Lords. *Hincksman v. Smith.* *Smith v. Hincksman.* 433

REVOCATION.

A testator, having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life, and after his death, to the intent that the wife might receive annually a rent-charge, which was secured by powers of distress and entry, and by a term of years; and, subject to the rent-charge and the term, to the use of the settlor, his heirs and assigns; and he covenanted to surrender the copyholds to the uses of the settlement: the marriage was solemnized, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement: the covenant to surrender did not operate as an entire revocation of the devise of the copyholds, but was a revocation only so far as

the particular purposes of the settlement required. *Vawser v. Jeffery.* Page 479
See MARRIAGE SETTLEMENT, 1.

SALE.

Premises, held under distinct leases, ordered to be sold in one lot, upon the speculative probability arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots. *Cook v. Collingridge.* 520

See LAND TAX.

LEASEHOLDS, 5.

TRUSTEE, 1.

SCOTLAND.

A Scotchman, by a will in the *English* form, made in *England*, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in *Scotland*, upon trust to lay out the same in the purchase of lands, or rents of inheritance in fee simple, for the intent expressed in an instrument of even date with his will; and by that instrument, he directed the trustees of his will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of *Montrose*, to be by them applied to the relief of indigent ladies in *Montrose*, or within twenty miles of that town: Held, that the bequest was void by the mortmain act. *Attorney-General v. Mill.* 328

SOLI-

SOLICITOR AND CLIENT.*See* COSTS, 3, 4.

PRACTICE, 8.

SPECIFIC LEGACY.

If an executor, acting *bond fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4% per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors. *Spode v. Smith.*

Page 511

SPECIFIC PERFORMANCE.

1. Upon a bill, praying the performance of an agreement duly signed, but offering to the Defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the Court will decree a specific performance of the agreement with those variations, if the Defendant elects to take advantage of them; and if the Defendant does not so elect, it will decree a specific perform-

ance of the original agreement. *Robinson v. Page.* Page 114

2. Treaty and negotiations for a variation of the terms of a contract will not amount to a waiver, unless the circumstances shew, that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract. *Robinson v. Page.* *Ibid.*

3. A purchaser of a share in a co-partnership business, does not waive objections to the title by taking possession of the property and acting as a partner, when the contract stipulates that a good title shall be made by a specified future day, and it appears to have been the intention of the parties that the purchaser should, immediately and before that day, have the possession.

4. The vendor of a share in a co-partnership business, filed a bill against the purchaser who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically: the Court was of opinion that the title had not been accepted, and, as a good title was not shewn, a specific performance could not be decreed: Held, that, upon a record so framed, no accounts or inquiries could be directed as to the Defendant's possession and management of the property, with a view to ascertain whether any and what sum

sum ought to be paid, or compensation made, by him to the Plaintiff. *Stevens v. Guppy.*

Page 171

5. On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, and, pending the suit, continued in possession until 1823, the Plaintiff, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the Court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated by his answer that he was willing to pay a fair rent. *Williams v. Shaw.* 178

6. In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase-money on a day specified, "upon the vendor's making a good title, or, otherwise, if such title should not be then completed, upon his executing a bond to complete such title, and to convey the estate as soon as the same could be completed:" the vendor is bound to shew a good title; and, till a good title is shewn, the purchaser, though he had entered into possession, is not bound to pay the purchase-money. *Clarke v. Faux.* 320

7. A person who has entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the re-

demption of the land-tax, is not bound to complete his purchase, when it appears that, upon the prior sale for the redemption of the land-tax, the rector was himself the actual purchaser, in the name of his curate. *Grover v. Hugell.* Page 428

STATUTES, CONSTRUCTION OF.

9 Geo. 2. c. 36.	328
25 Geo. 2. c. 6.	436
17 Geo. 3. c. 26.	267
47 Geo. 3. c. 74.	188. 416
53 Geo. 3. c. 102. s. 19.	376
6 Geo. 4. c. 16.	422, 423
7 Geo. 4. c. 45.	369

STOCK.

See LAND-TAX.

SURETY.

1. A surety under an annuity deed, redeeming the annuity, subsequently to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who has obtained his certificate, for the arrears of the annuity subsequent to the commission. *Watkins v. Flannagan.* 421
2. *Semble*, where the parties intended that a promissory note should be joint and several, but through ignorance, it is expressed to be joint only, a court of equity will relieve as well against the surety, as against the principal.

But where a joint promissory note, signed "J. and J. E. — J. P.,

J. P., surety," was given to a creditor of the firm of *J.* and *J. E.*, and *J. P.* died, *J.* and *J. E.* being both alive, one of whom afterwards became bankrupt, while the other quitted the country insolvent: Held, that the promissory note could not be considered as several against *J. P.*, the surety. *Rawstone v. Parr.*
Page 424. 539

TAXATION.

1. A bill of costs was delivered by the solicitor in 1809, and shortly afterwards paid by the client: between that time and *March* 1817, four other bills of costs were delivered, and various payments were made on account: in *November* 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating, that he would insist on having the bills taxed; an application for taxation to a Judge at law, in 1818, and an application to the Court of King's Bench in 1819, failed, from circumstances not involving the merits of the question: some attempts at a compromise were made from time to time; and the client was obliged, on three or four occasions, to leave *England*, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were

improper: the Court ordered that the bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the Master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the Master should exercise as large a discretion as he might think fit with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Scougall v. Campbell.*
Page 545

2. If any solicitor tells a client beforehand, that he will not undertake his business, if his bill is to be taxed; or if any solicitor, in the progress of a cause, gives his client to understand, that he will go on with it or not go on with it, according as his bills are to be taxed or not to be taxed; a solicitor, so acting, will not be allowed to continue on the rolls. *Scougall v. Campbell.*
550

TENANT FOR LIFE.

The Court will not, on the application of a tenant for life, direct an inquiry, whether it would be for the benefit of all parties interested in the property, that certain permanent and substantial improvements should be made in the mansion-house. *Nairn v. Marjoribanks.*
582

TITHES.

Though mere nonpayment of tithes, for however long a period, would not be evidence of a grant, yet a layman's adverse enjoyment or per-

pernancy, for a long series of years, of the tithes of certain lands, or of a money-payment in lieu of tithes, coupled with a succession of deeds by which the tithes or money-payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. *Bacon v. Williams.*

Page 525

TOLLS.

A receiver of tolls appointed. *Dumville v. Ashbrook.* 98

TRUSTEE.

1. The rule that trustees for sale, with the approbation of the tenant for life, may sell to the tenant for life, does not furnish a general principle, but is an exception to a general principle. *Grover v. Hugell.* 432
2. An executor or trustee is not entitled to be allowed without question the amount of bills of costs which he has paid *bond fide* to the solicitor to the trust; and the Master, without regularly taxing the bills, will moderate their amount. *Johnson v. Telford.* 477
3. *Semble*, A trustee under an old trust, creating successive limitations of equitable interests, some of which had failed, is entitled, before he can be required to convey, to have the equitable title of those who call for a conveyance ascertained by inquiry, and to have the deed of con-

veyance settled in the Master's office. *Goodson v. Ellisson.*

Page 583

4. *Semble*, Where the *cestuis que trust* convey their beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the *cestuis que trust*, who sold to him, parties to the suit. *Goodson v. Ellisson.* *Ibid.*

See ASSIGNMENT, 1.

EXECUTOR, 1.

VENDOR AND PURCHASER.

1. The rule that trustees for sale, with the approbation of the tenant for life, may sell to the tenant for life, does not furnish a general principle, but is an exception to a general principle. *Grover v. Hugell.* 432
2. Where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration. *Honner v. Morton.* 65
3. The rule, that the purchaser of a reversion must prove that he gave a full price, has so long been considered as settled, that it

it can be altered only by the court of appeal. *Hinckman v. Smith. Smith v. Hinckman.*

Page 433

4. By an agreement for the sale of an estate, the purchase-money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance, which was afterwards executed, expressed that the purchase-money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest, within twelve months after the death of the vendor; and of interest in the mean time. The vendor was held to have a lien on the estate for the amount of the bond. *Winter v. Lord Anson.* 488

5. There is no distinction between copyholds and freeholds, as to the doctrine of a vendor's lien for his purchase-money. *Winter v. Lord Anson.* 492

VESTING.

See WILL, 3. 9. 13.

WAIVER.

Treaty and negotiations for a variation of the terms of a contract will not amount to a waiver, unless the circumstances shew, that it was the intention of the parties that there should be an

absolute abandonment and dissolution of the contract. *Robinson v. Page.* Page 114

See BARON AND FEMME, 2, 3.

WILL.

1. By the custom of the manor of *Shap*, the legal interest in lands of customary tenure, parcel of the manor, was not devisable, but was transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words were, "bargain, sell, and surrender," and on the presentment or production of which, admittance was granted to the alienee; but an equitable interest in such customary lands was capable of being passed by devise without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them, by a deed of bargain, sale, and surrender, to a trustee, upon trust for such person as the tenant, by any deed or instrument in writing, or by his last will, or any codicil thereto, or any instrument in the nature of a last will or codicil, to be by him legally executed, should appoint or devise the same; and under this conveyance the trustee was admitted: Held, that the equitable interest in the lands would not pass by an unattested codicil. *Willan v. Lancaster.* 108
2. A will began as follows: — "In the first place, I will that all my debts and funeral charges be paid and discharged by my executors hereinafter named. Then I give

I. give and bequeath unto my eldest son, *Richard Willan*, my estate at *Shap*, on condition that he make up the deficiency in the payment of the two legacies which I have left to my younger son and daughter :” Held, that the testator’s debts were not charged on the estate at *Shap*.

Willan v. Lancaster. Page 108

3. A testatrix gave the interest of the residue to her brother during his life, and after his death, she gave the residue to her executors, in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the mean time ; of these four persons, two died during the life of the brother : Held, that the two, who died, did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors. *Pope v. Whitcombe.* 124

4. Under a bequest of a residuary fund to the testator’s first and second cousins, and the children of his kinsman *George Charge*, which children were first cousins of the testator, twice removed, all persons related to the testator in the degree of second cousins are entitled. *Charge v. Goodyer.* 140

5. A testator, after giving his wife an annuity for her life, to be issuing out of “all his real estate, lands, and hereditaments in *P.*,” devised “the said estate, lands, and hereditaments” to his daughter and her heirs ; but, in case his

daughter died under twenty-one, and without issue, he devised “the said estate, lands, and hereditaments” to his wife for her life, and after her decease, to the children of *A.*, share and share alike : Held, that, subject to the previous interests given to the daughter and to the wife, the children of *A.*, living at the testator’s death, took an estate in fee in the lands in *P.* *Wilkinson v. Chapman.* Page 145

6. A testatrix devises leaseholds to *A.*, subject to the yearly sum of 12*l.*, for the sole use of Mrs *B.*, to be paid her half-yearly, and this annuity was payable on the 27th of *January* and 27th of *July* ; many years afterwards, *A.* devises to *R.* all his lands (in which these leaseholds were included), paying Mrs. *B.* 12*l.* per annum, by half-yearly payments, to be made on the 27th of *January* and the 27th of *July*. Mrs. *B.* is entitled, under *A.*’s will, to a second annuity, distinct from, and in addition to, the annuity given her by the will of the testatrix. *Bartlett v. Gillard.* 149

7. A testator, after bequeathing to his wife an annuity, charged on his estate at *S.*, with power of entry and distress, if it should be in arrear for thirty days, and giving other legacies and annuities, which he charges on his lands at *S.* in aid of his personal estate, gives and devises all his real and personal property to trustees, upon certain trusts ; and he directs them to occupy and manage,

manage, during the minority of his son, a farm constituting the greater part of his estate at S., and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates: Held, that the widow must be put to elect between her dower and the benefits given her by the will. *Roadley v. Dixon.* Page 192

8. By a marriage settlement, a sum of 4000*l.* was to go, after the decease of the husband and the wife and the husband's father, and subject to the father's power of appointment, to the children of the marriage equally; and the real estates of the wife were charged with a sum of 8000*l.*, which was to be divided among the children, in such shares and manner as she should appoint. The wife, by her will, appointed 100*l.* to the eldest son of the marriage, and the remaining 7900*l.* to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters on their attaining that age, or marriage with their father's consent; she likewise created a further charge, in order that each younger child's share of the 8000*l.* might be augmented to 5000*l.*; and, by the same instrument, she, in exercise of a power of appointment, which she had under the will of C., appointed C.'s residuary property to the first and other sons of the marriage successively, who should attain twenty-one; and if there were no such sons, to the

daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters, and that, if no son of the marriage should live to attain twenty-one or be married, each of her daughters should be entitled to have for her fortune 10,000*l.*, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son and three daughters her surviving; and in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the 4000*l.*, and, under their mother's appointment, to the residuary property of C.: Held,

That they were entitled to receive 10,000*l.*, exclusive of, and in addition to, their shares of the 4000*l.* and of the residuary property of C. *Whyte v. Kearney.*

Page 208

9. A testator gave stock to trustees, to be divided, after the death of two persons who had life-interests in it, among A., B., C., D., and E. in equal shares; and he directed, that, if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue should go to, and be

be equally divided among, the survivor and survivors of them.

A. died, leaving issue, who were living at the time fixed for the distribution of the fund: then *B.* died, leaving a son, who died without issue, before the period of distribution; shortly afterwards, and also before the period of distribution, *C.* died without issue: Held,

That *B.*'s personal representative was not entitled to any portion of the fund:

That the one third of *B.*'s share, which, on the failure of her issue, survived to *C.*, did not, on *C.*'s death, survive to the other legatees, but was transmitted to her personal representative:

That the words "survivor and survivors," were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the shares of *B.* and *C.* went over to *A.*'s personal representative. *Crowder v. Stone.* Page 217

10. A testator, seised of estates in fee, and holding certain lands and tithes in the county of *H.* under church-leases for lives, devised all his lands and hereditaments in the counties of *H.* and *G.*, and all other his real estate, to his daughter and the heirs of her body; and for default of such issue, to *F.* and his heirs. The daughter, at the testator's death, and ever afterwards, was of unsound mind. Her husband, having taken out administration to the testator, with the will annexed, procured, from time to
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time, renewals of the leases. She survived him, as well as all the *cestuis que vie* named in the testator's leases, and died without issue, and without having done any act to bar such interest as *F.* had under the devise. Held,

That the leaseholds for lives passed by the will: and,

That *F.* was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases. *Fitzroy v Howard.* Page 225

11. A testator, beginning his will by expressing an intention to give the bulk of his property to two of his sisters, gave them only a life interest in the greater part of it; and, after giving legacies to others of his sisters, he expressed his wish, that *A.*, and his, the testator's, servant *B.* should be his executors, and that *B.* should live with his two sisters, and take care of them and their property; and by a codicil, he directed that the interest of 300*l.* should be paid to *B.* half-yearly, as wages for taking care of his two sisters; and that, after the death of *B.* and his two sisters, the 300*l.* should be paid to *P.*: Held,

That the legacy given to *B.* by the codicil was not a legacy given to her for her care and trouble, so as to convert her into a trustee of the residue for the next of kin, but that *A.* and *B.*, in their character of executors, took the residue beneficially:

That, after the death of the two sisters, though the services,

U u for

for which the legacy was given as wages, could no longer be performed, *B.* would still be entitled to the interest of the 300*l.* during her life. *Dawson v. Thorne.*

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12. A testator, being absolute owner of some copyholds, of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor, to which he had not been admitted, but subject to trusts, under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered to the use of his will all his copyholds, holden of that manor, or which he was seised of, or entitled to, either in possession, reversion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainders over: Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the deviser was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate

tail, which he took under the old trusts, to which some of the copyholds were subject. *Abdy v. Gordon.*

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13. A testator gave his property, after the death of his wife, to trustees, on trust to pay the interest and profits to his two daughters *J.* and *E.*, to their separate use, with a direction to pay to and apply for the benefit of *A.*, the son of *E.*, 200*l.* annually, when he attained the age of twenty-one years, and before that period, such part of the 200*l.* bequeathed to him, as might be judged proper; he then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to *E.*, and from which the interest is to arise to my grandson, viz. 4000*l.*, which sum shall be my grandson's property;" and, in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren:

Held, that *A.* was not entitled to the annuity, till he attained twenty-one; nor to the 4000*l.*, till the death of his mother: And,

A. having attained twenty-one, and died in his mother's lifetime — Held, that the annuity ceased upon his death, but that the 4000*l.* vested in him. *Livesey v. Livesey.*

Page 287, 542

14. A bequest of household furniture and other household effects in a dwelling-house and premises, comprises

comprizes all property placed there, either for ornament, or for use or consumption in it.

Cole v. Fitzgerald. Page 301

15. A testatrix bequeathed one moiety of the residue of her personal estate to her daughter *Hannah*, for her separate use, during the joint lives of her and her husband; and if she survived him, to her absolutely; if not, to such of her children living at her decease as should attain twenty-one; with a bequest over, if there were no such children, to another daughter, *Mary*, and her children; and she bequeathed the other moiety to her daughter *Mary*, for her separate use, during the joint lives of her and her husband, and, after her decease, to such of her children living at her decease as should attain twenty-one; and if there were no such children of *Mary*, to *Hannah* and her children, in like manner as the first moiety; with a proviso, that, if *Hannah* died in her husband's lifetime, and should not have a child living at her decease who should attain twenty-one, the second moiety was to go over to *Hannah's* executors and administrators; and that, in like manner, the first mentioned moiety, in the event in which it was limited over, should, if *Mary* had not a child living at her death who should attain twenty-one, go over to *Mary's* executors and administrators: by a codicil, the testatrix gave 1500*l.*, if *Mary* died without leaving any child who attained twenty-

one, to *Hannah* and her children, in the same manner as was in the will directed touching the first mentioned moiety of the residue; and in case both daughters died without leaving any child living who should attain twenty-one, she bequeathed the 1500*l.*, together with all the residue of her personal estate, to *A.*: both the daughters died without issue, but *Hannah* survived her husband: Held, nevertheless, that *A.* was entitled to the residue. *Hopkins v. Towle.* Page 304

16. Previous to marriage, the fortune of the wife is so settled as, in the event of her surviving her husband, to belong to her absolutely; by other deeds of the same date, the husband makes a settlement of his property, under which certain interests are given to the wife; he dies in her lifetime, having, by his will, bequeathed to her considerable benefits, which he directs shall be in satisfaction of all her claims or demands against his estate or executors under the settlement made by him, or on any other account whatsoever: the acceptance of the benefits given to her by the will does not preclude the wife from claiming a leasehold, part of her own fortune, which the husband was bound to renew in the name of trustees, and upon the trusts of her settlement, but which he had renewed in his own name. *Coleman v. Jones.*

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17. A legacy was given to the separate use of a married woman

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during the joint lives of her and her husband, and in case she survived him, to her absolutely, but if she did not survive him, to such person as she should by will appoint, and, in default of appointment, to her next of kin, exclusive of her husband: she died in the lifetime of her husband and the testator: Held, that the legacy lapsed. *Baker v. Hanbury*. Page 340

18. Where a testator directs his just debts and funeral expenses to be fully paid and satisfied by his executor thereafter named, it is a condition imposed upon the executor to satisfy the testator's debts and funeral expenses, as far as all the property, which he derives under the testamentary disposition, will extend, whether real or personal. *Henvell v. Whitaker*. 343

19. A devise of lands to A. "for paying his son 50*l.* when of the age of twenty-one years," gives A. the fee beneficially, charged with the payment of 50*l.* *Abrams v. Winshup*. 350

20. Where, under a settlement, a testator had, in a certain event, the fee of an estate, subject to a term, and had, under the same settlement, a power, in the particular event, to appoint the fee, subject to the term, by deed or will, and by his will he devised the estate in fee, without reference to his power, the will took effect as a devise of his interest, and not as an execution of his power. *Farmer v. Bradford*. 354

21. By the same settlement he had, in the events which happened, a power to appoint a sum of 1000*l.*, which was to be raised after his death by the term to which the fee of the same estate was subject; but his will took no notice whatever of this power: the devise of the estate did not operate as an execution of the power to appoint the 1000*l.* *Farmer v. Bradford*. Page 354

22. The words, if "A. B. shall happen to die, leaving a child or children," construed to mean, upon the effect of the whole will, the death of A. B. before the testator's widow.

A testator gave the residue of his estate upon trust, to pay the interest to his widow during her life for her separate use, and, after her decease, to pay the principal to C. for her own use, and to be at her own disposal; but if C. should happen to die, leaving any child living at her decease, then to such child or children; and if she should happen to die, without any child living at her decease, then to D. and E.; but if either of them should die, before they should become entitled to receive the fund, then he gave the whole to the survivor; and if they should both die in the lifetime of his widow, then he gave the whole to his wife absolutely: C., having survived the widow, was entitled to the residue absolutely. *Da Costa v. Keir*. 360

23. In order to advance the apparent intention of the testator, the

- the words, "if he should die," were construed, "when he should die." *Smart v. Clark*. Page 365
24. A testator devised his real and personal property to trustees, upon trust for four children of *Martha Davies*, whom he described by their respective names, "together with every other child born of the body of *Martha Davies* alive at my decease, or born within nine months afterwards, share and share alike:" *Martha Davies* had two other children born after the date of the will, but before the date of a codicil to it; and these, as well as the four children previously born, were all illegitimate: The children, born after the date of the will, are not entitled to any share of the property. *Mortimer v. West*. 370
25. Construction of a will as to the question, whether the proceeds of real estate were made the primary fund for the payment of certain legacies. *Rickets v. Ladley*. 418
26. The statute of the 25 G. 2. c. 6. does not extend to wills which dispose of personal estate only; and a legacy to a person, who is an attesting witness to such a will, is not void. *Emanuel v. Constable*. 436
27. When a testator directs a sum to be laid out in building a church, the bequest is void; the rule of construction being, that a direction to build includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain. *Pritchard v. Arbouin*. Page 456
28. A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay his son's debts, and named the son of his son his residuary devisee and legatee. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay. *Walker v. Lodge*. 459
29. A general devise of all lands of which the testatrix had power to dispose, is not a good execution of a power to appoint monies, which were to arise from the sale of land. *Adams v. Austen*. 461
30. A testator by his will bequeathed as follows:—"And unto my wife (who I make full and wholly executrix) I give my house, with all my household furniture, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses:" Held, that the beneficial interest in stock, which formed part of his general estate, did not pass to the wife. *Collier v. Squire*. 467

WITNESS.

The statute of the 23 G. 2. c. 6.
does not extend to wills disposing
of personal estate only; and a

bequest to a person, who is an
alien, is void. *Lawrence v. Cox*
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END OF THE THIRD VOLUME.

